



San Francisco Law Library


No.

Presented by

EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

815
814
No. 2264

United States

Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record. (IN TWO VOLUMES.)

CONTINENTAL AND COMMERCIAL TRUST AND
SAVINGS BANK, a Corporation, and FRANK
H. JONES, Trustees,

Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Cor-
poration, and UNION PORTLAND CEMENT
COMPANY, a Corporation,

Appellees.

VOLUME I.

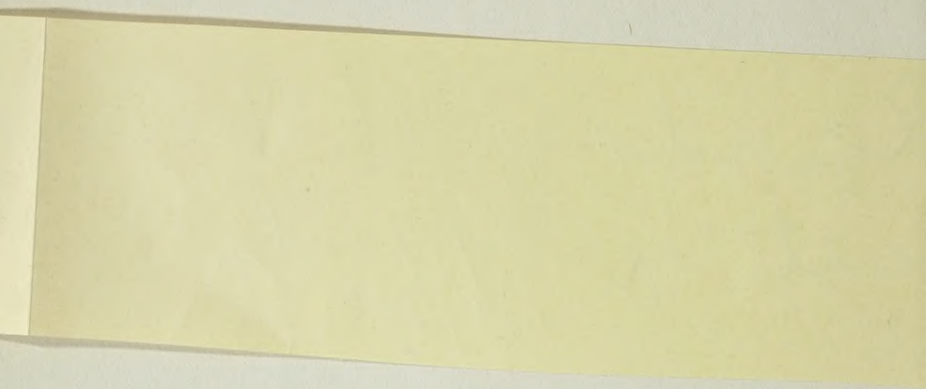
(Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.

FILED

APR 22 1913

Records of U.S. Circuit
Court of Appeals
8/15



No. 2264

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

CONTINENTAL AND COMMERCIAL TRUST AND
SAVINGS BANK, a Corporation, and FRANK
H. JONES, Trustees,

Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Corporation, and UNION PORTLAND CEMENT
COMPANY, a Corporation,

Appellees.

VOLUME I.
(Pages 1 to 320, Inclusive.)

Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.

INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

	Page
Affidavit of Ralph G. Arnold.....	148
Affidavit of Frank Coy.....	149
Affidavit of Amos C. Miller.....	144
Affidavit of W. H. Rosecrans.....	149
Affidavit of Samuel Storrow.....	150
Amendments to Answer.....	65
Answer of Continental and Commercial Trust and Savings Bank and Frank H. Jones to Bill of Complaint in Intervention.....	118
Answer of Continental and Commercial Trust and Savings Bank and Frank H. Jones....	48
Answer, Separate, of the Big Lost River Irriga- tion Company, a Corporation, to the Above- entitled Bill of Complaint.....	43
Answer of the Big Lost River Irrigation Com- pany to the Complaint in Intervention of the Union Portland Cement Company.....	135
Assignment of Errors.....	681
Attorneys of Record, Names and Addresses of..	1
Bill of Complaint.....	1
Bill of Complaint in Intervention of the Union Portland Cement Company.....	82

Index.	Page
Bond on Appeal.....	690
Citation.....	697
Clerk's Certificate of District Court to Trans- script of Record.....	699
Consent of Stockholders on the Record.....	580
Decree, Final.....	665

EXHIBITS:

Exhibit "A" to Complaint in Intervention (Notice of Intention to Hold and Claim a Lien).....	103
Exhibit "A" to Bill of Complaint (Notice of Intention to Hold and Claim a Lien)	21
Plaintiff's Exhibit No. 14 (Contract by and Between G. S. Speer, Successor in In- terest to The Big Lost River Land and Irrigation Company, Limited, and The State of Idaho).....	457
Plaintiff's Exhibit No. 19 (Certificate for Payment on Contract for Mackay Reservoir Dam).....	482
Plaintiff's Exhibit No. 20 (Certificate for Payment on Contract for Canal Sys- tem Big Lost River Irrigation Project)	483
Plaintiff's Exhibit No. 23 (Contract Be- tween Corey Brothers Construction Company and Big Lost River Irriga- tion Company, Dated August 26, 1909)	484
Plaintiff's Exhibit No. 24 (Construction Contract, Dated September 18, 1909) . .	534
Plaintiff's Exhibit No. 30 (Letter Dated Mackay, Idaho, June 7, 1909, from H.	

Index.

Page

EXHIBITS—Continued:

B. Raschbacher to Corey Brothers Construction Company).....	186
Plaintiff's Exhibit No. 32 (Certificate of Qualification of Foreign Corporation)	537
Plaintiff's Exhibit No. 65 (Contract Dated February 16, 1910, Between the Arnold Company and the Big Lost River Irrigation Company).....	538
Plaintiff's Exhibit No. 83 (Telegram Dated Salt Lake, Utah, October 6, from H. Raschbacher to Corey Bros. Construction Company).....	544
Plaintiff's Exhibit No. 84 (Letter Dated Cheyenne, Wyoming, September 7, 1909, from H. Raschbacher to Corey Bros. Construction Company).....	544
Plaintiff's Exhibit No. 85 (Letter Dated Mackay, Idaho, October 25, 1909, from Corey Bros. Construction Company to W. H. Rosecrans).....	545
Plaintiff's Exhibit No. 86 (Letter Dated Chicago, November 6, 1909, from The Arnold Company, by W. H. Rosecrans to Corey Bros. Construction Company)	547
Plaintiff's Exhibit No. 88 (Letter Dated Chicago, March 3, 1910, from W. H. Rosecrans to Corey Bros. Construction Company).....	548
Plaintiff's Exhibit No. 89 (Letter Dated	

Index.	Page
EXHIBITS—Continued:	
Chicago, August 18, 1909, from R. G. Arnold to W. W. Corey).....	549
Plaintiff's Exhibit No. 90 (Letter Dated August 24, 1909, from Corey Bros. Construction Company to The Arnold Company).....	550
Plaintiff's Exhibit No. 91 (Letter Dated Mackay, Idaho, July 31, 1909, from The Arnold Company, by H. G. Raschbacher, to The Corey Bros. Construction Company).....	551
Plaintiff's Exhibit No. 92 (Letter Dated Chicago, Illinois, July 8, 1909, from Trowbridge & Niver Company, by D. N. Niver, to Messrs. Corey Brothers).....	552
Plaintiff's Exhibit No. 93 (Letter Dated Chicago, February 12, 1910, from Trowbridge & Niver Company to Corey Bros. Construction Company).....	553
Plaintiff's Exhibit No. 94 (Letter Dated Chicago, March 12, 1910, from Trowbridge & Niver Company, by G. S. Speer, to W. W. Corey).....	554
Plaintiff's Exhibit No. 95 (Letter Dated Chicago, March 29, 1910, from Trowbridge & Niver Company, by G. S. Speer, to W. W. Corey).....	556
Defendants' Exhibit No. 77 (Blank Form of Settler's Agreement—Carey Act)...	558
Defendants' Exhibit No. 80 (Certificate of	

EXHIBITS—Continued:

Certified Copy of Articles of Incorporation of the Lost River Water Company).....	569
Final Decree.....	665
Letter, Dated July 1, 1912—W. S. Collins to Amos C. Miller.....	153
Minutes of Adjourned Meeting, July 25, 1910..	638
Minutes of Annual Meeting of Stockholders, January 11, 1910.....	617
Minutes of First Meeting of Directors.....	582
Minutes of First Meeting of Incorporators....	575
Minutes of Meeting of Board of Directors, January 11, 1910.....	619
Minutes of Regular Quarterly Meeting of Board of Directors, October 5, 1909.....	610
Minutes of Special Meeting of Board of Directors, January 16, 1911.....	639
Minutes of Special Meeting of Board of Directors, March 12, 1910.....	622
Minutes of Special Meeting of Board of Directors, May 31, 1910.....	630
Minutes of Special Meeting of Board of Directors, June 27, 1910.....	634
Minutes of Special Meeting of Board of Directors, July 14, 1910.....	636
Minutes of Special Meeting of Board of Directors, August 21, 1909.....	587
Minutes of Special Meeting of Board of Directors, August 27, 1909.....	593
Minutes of Special Meeting of Board of Directors, August 30, 1909.....	598

Index.	Page
Minutes of Special Meeting of Board of Directors, September 7, 1909.....	606
Minutes of Special Meeting of Board of Directors, September 17, 1909.....	608
Minutes of Special Meeting of Stockholders, March 12, 1910.....	620
Minutes of Special Meeting of Stockholders, August 21, 1909.....	590
Minutes of Special Meeting of Stockholders, August 27, 1909.....	596
Minutes of Special Meeting of Stockholders, August 30, 1909.....	602
Names and Addresses of Attorneys of Record..	1
Opinion.....	641
Order Allowing Appeal.....	680
Order Allowing Certain Amendments to Answer.....	79
Order Appointing Receiver.....	139
Order Relative to Exhibits on Appeal.....	698
Petition for Appeal.....	679
Return to Record.....	698
Separate Answer of the Big Lost River Irrigation Company, a Corporation, to the Above-entitled Bill of Complaint.....	43
Stipulation that Certain Affidavits, etc., be Taken and Considered as Evidence.....	143
Stipulation Relative to Record on Appeal.....	692
Testimony—Evidence.....	154
TESTIMONY ON BEHALF OF PLAINTIFF:	
CLARK, D. WORTH.....	200
COREY, A. T.....	160

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
Cross-examination—By Mr. Hender-		
son.....		161
Cross-examination—By Mr. Ruick...		161
Redirect Examination.....		161
Recross-examination—By Mr. Hender-		
son.....		162
Recross-examination—Mr. Ruick.....		162
Recalled.....		200
Recalled.....		202
Cross-examination.....		202
Recalled.....		222
Cross-examination.....		223
Redirect Examination.....		223
Recross-examination.....		223
COREY, ORSON O.....		163
Recalled.....		218
Cross-examination.....		218
Recalled.....		224
Cross-examination... ..		224
COREY, W. E.....		212
Cross-examination... ..		212
Redirect Examination		215
Recross-examination.....		216
Recalled—Cross-examination... ..		241
Redirect Examination.....		241
COREY, W. W.....		162
Recalled.....		187
Cross-examination... ..		192
Redirect Examination.....		197

Index.	Page
TESTIMONY ON BEHALF OF PLAIN-	
TIFF—Continued:	
Recross-examination	198
Redirect Examination	199
Recross-examination	199
Recalled	201
Recross-examination.....	201
Redirect Examination	201
Recalled—Cross-examination	209
Recalled	217
Recalled	231
Recalled	426
Cross-examination ...	431
Redirect Examination	434
Recross-examination	435
Recalled—Cross-examination	442
Recalled	448
Recalled.....	453
Cross-examination	454
DRUMMOND, GOYNE.....	155
Recalled	166
Cross-examination	166
Redirect Examination	184
Recross-examination	185
Redirect Examination	186
Recalled	231
Recalled—Cross-examination	242
Redirect Examination	243
GILSON, OSBORNE B.....	203
Cross-examination	208
Recalled	219

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
Cross-examination		221
Redirect Examination		222
Recalled—Cross-examination		234
Redirect Examination		236
HALE, HEBER Q.		231
Cross-examination		232
Redirect Examination		234
Recross-examination		234
HENDERSON, JOHN T.		436
Cross-examination		438
Redirect Examination		442
HIGGINBOTHAM, FRANK D.		203
Recalled—Cross-examination		210
Recalled—Cross-examination		239
HURTT, C. B.		157
Cross-examination		160
Recalled		164
Recalled		211
Cross-examination		224
Redirect Examination		227
Recross-examination		229
Redirect Examination		229
Recalled		450
Cross-examination		451
Redirect Examination		452
Recross-examination		453
LYNCH, JAMES A. (in Rebuttal)		417
Cross-examination		422
Redirect Examination		425

	Index.	Page
TESTIMONY ON BEHALF OF PLAIN-		
TIFF—Continued:		
WAYMAN, WILLIAM M.....		448
Cross-examination		449
Redirect Examination		450
Recross-examination		450
WILLIAMS, P. L.....		236
Cross-examination		237
Recalled		240
TESTIMONY ON BEHALF OF DEFEND-		
ANTS:		
ARNOLD, RALPH G.....		380
Cross-examination....		382
BINCKLEY, GEORGE H.....		394
Cross-examination.....		397
Redirect Examination.....		399
Recross-examination....		400
Redirect Examination.....		401
CARHART, FRANK MILTON (Recalled)		244
Cross-examination....		246
Redirect Examination.....		246
COLLINS, W. S.....		443
Cross-examination		446
COY, FRANK A.....		384
Cross-examination		392
Redirect Examination.....		393
DAY, W. F.....		411
Cross-examination.....		415
Redirect Examination.....		415
GREEN, JAMES A.....		402
Cross-examination.....		405

TESTIMONY ON BEHALF OF DEFEND-

ANTS—Continued:

Redirect Examination.....	409
Recross-examination....	410
HALE, HEBER Q.....	415
HURTT, C. B.....	354
Recalled.....	416
Cross-examination... ..	417
ROBERTS, PAUL S.....	267
Cross-examination....	273
Redirect Examination....	336
Recross-examination....	338
ROSECRANS, W. H.....	370
Cross-examination....	376
Redirect Examination....	378
Recross-examination	379
Redirect Examination.. .	380
Recross-examination.. .	380
SPEER, G. H.....	356
Cross-examination	364
STORROW, SAMUEL....	247
Cross-examination .. .	261
Recalled—Cross-examination.. .	343
Redirect Examination....	353
Recalled.....	401

[Names and Addresses of Attorneys of Record.]

H. H. HENDERSON, Esq., Ogden, Utah,

Attorney for Complainant and Intervenor.

Messrs. MAYER, MEYER, AUSTRIAN & PLATT,
AMOS C. MILLER, Esq., Chicago, Ill.,

Messrs. RICHARDS & HAGA, Boise, Idaho,
Attorneys for Defendants.

[Bill of Complaint.]

*In the Circuit Court of the United States in and for
the District of Idaho, in the Ninth Circuit.*

IN EQUITY.

COREY BROS. CONSTRUCTION COMPANY, a
Corporation,

Plaintiff,

vs.

BIG LOST RIVER IRRIGATION COMPANY,
a Corporation, THE AMERICAN TRUST
AND SAVINGS BANK, a Corporation, and
FRANK H. JONES,

Defendants.

To the Honorable Judges of the Circuit Court of the
United States in and for the District of Idaho,
in the Ninth Circuit, Sitting in Equity:

Corey Bros. Construction Company, a corporation
organized and existing under and by virtue of the
laws of the State of Utah, a citizen of the State of
Utah, brings this its bill against the Big Lost River
Irrigation Company, a corporation organized and

existing under and by virtue of the laws of the State of Idaho, and a citizen of the State of Idaho, and The American Trust and Savings Bank, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, and Frank H. Jones, a citizen of Chicago, State of Illinois, and thereupon your orator complains and says: [1*]

That your orator Corey Bros. Construction Company is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Utah, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Utah, and that the defendant Big Lost River Irrigation Company is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Idaho, and that the defendant The American Trust and Savings Bank is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Illinois, and that the defendant Frank H. Jones is now, and was at all the times hereinafter set out, a resident and citizen of the city of Chicago, State of Illinois, within the meaning of the laws fixing and determining the jurisdiction of this Honorable Court.

*Page-number appearing at foot of page of original certified Record.

Your orator further shows unto your Honorable Court that at all the times hereinafter mentioned your orator has transacted business and carried on operations as a contractor, in its corporate name and capacity, in the counties of Custer, Blaine, Bingham and Fremont, State of Idaho, and at all the times hereinafter set out had accepted the provisions of the Constitution, and had complied with the laws of the State of Idaho, relative to foreign corporations doing business within said State.

Your orator further shows unto this Honorable Court that on or about the 26th day of August, 1909, the defendant, Big Lost River Irrigation Company, entered into a written contract with your orator for the furnishing of labor and certain materials in the construction of its canal system, together with the clearing, [2] bond plowing, excavation of canals, drain ditches, excavating waterways, waste ditches, building dams, reservoirs, riprap and pumping water, which system is and was known as the "Big Lost River Irrigation System."

And your orator further shows unto this Honorable Court that according to the terms of said contract, your orator was to furnish all labor and part of the materials required to construct an earth dam, diversion works, tunnel, canals, concrete structures for said irrigation system, all in accordance with plans and specifications prepared by the engineer for said company. That the construction of said work was under the supervising engineer of the defendant Big Lost River Irrigation Company, and that the time for the completion of said work was to be before

May 1st, 1910, unless your orator should be prevented from completing said work, by reason of strikes, inevitable accident or casualty, the act of God, or for any cause over which your orator had no control. That your orator was to receive for the work done upon said dam and canal system the following prices, to wit:

Earth and gravel, to construct dam, \$0.25 per cubic yard.

Tunnel excavation at dam, \$5.00 per cubic yard.

Tunnel excavation in canal, \$6.00 per cubic yard.

Riprap per square yard (not hand laid), \$1.00.

Concrete of all kinds and structures, \$12.00 per cubic yard.

Driving piling, cost plus 10%.

Solid rock excavation, \$1.50 per cubic yard.

Loose rock excavation, \$.50 per cubic yard.

Earth excavation in canal, \$.16 per cubic yard.

Clearing sage brush, \$6.00 per acre.

Lumber, in place, \$40.00 per thousand. [3]

Wet excavation below river level, cost plus 10%.

Wash gravel, or 90% pure gravel, \$.25 per cubic yard.

Pumping of all kinds, cost plus 10%.

Any extra work ordered by Engineer, cost plus 10%.

Riprap, hand laid, \$1.00 per sq. yard.

Plus 110% cost of laying.

All material furnished by contractor, except lumber, cost of haul plus 10% cost of material.

The same classification of materials shall hold as stated in specifications for Mackay dam.

On canal construction, the length of free haul shall be 200 feet, measured from center of gravity of embankment to center of gravity of excavation. An allowance of 1½ cts. per cu. yd. per 100 ft. overhaul shall be made.

For hauling cement from the nearest railroad station to the dam site, the contractor shall be allowed \$1.50 per ton; but all cement for canals shall be hauled by the contractor free.

Your orator further shows unto this Honorable Court that 90% of the cost of the materials furnished and work done should be paid to it by the defendant Big Lost River Irrigation Company, on or before the 10th day of each calendar month, for all work done during the preceding calendar month, and that said payments should be made on the estimates of the engineer of the amount of work done and material furnished.

Your orator further shows unto this Honorable Court that in pursuance of said contract of employment, it performed the following work: [4]

Work Done on Canals to Date.

Force account and extra work cost plus

10%	\$38,490.47
Earth excavation 1,306,914.3 cu. yds. @	
16¢	209,106.28
Gravel excavation 542,531.2 cu. yds. @ 25¢	135,632.80
Loose rock excavation 147,940.3 cu. yds.	
@ 50¢	73,970.15
Solid rock excavation 239,414.9 cu. yds.	
@ 1.50	359,122.35
Clearing 938.82 acres 6.00	5,632.92

6 *Continental & Commercial etc. Bank et al.*

Concrete 3,282.09 cu. yds. @ 12.00.....	39,385.08
Concrete (reinforced) 3,445.49 cu. yds. @ 12.50	43,068.63
Riprap, hand laid, 11,192.13 sq. yds. @ 1.00	11,192.13
Bridging 227,031.2 40.00 per thousand..	9,081.25
Tunnel excavation 1,146.8 cu. yds. @ 6.00	6,880.80
Riprap, not hand laid, 476.2 sq. yds @ 1.00	476.20
	<hr/>
	\$932,039.06

Work Done on Mackay Reservoir Dam to Date.

Force account and extra work, cost plus 10%	17,130.65
Tunnel excavation portals, 24,162. cu. yds. 50¢	12,081.00
Tunnel excavation portals, 2,304. cu. yds. 1.50	3,456.00
Cut-off trench 1,544. cu. yds. @ 25¢.....	386.00
Core-wall excavation 390 cu. yds. @ 25¢.	97.50
Tunnel excavation 2,487.5 cu. yds. @ 5.00	12,437.50
Earth embankment 479,908.0 cubic yds. @ 25¢.....	119,977.00
Loose rock embankment 9,000. cu. yds. @ 50¢	4,500.00
Concrete core-wall 2,080.2 cu. yds. @ 12.00	24,962.40
Spillway excavation 5,855. cu. yds. @ 1.50	8,782.50
Concrete in tunnel and around outlet pipes 1755.2 cu. yds. @ 12.00.....	21,062.40

Concrete on face of Dam 763.8 cu. yds.	
12.50	9,547.50
Coffer Dam embankment 18,537. cu. yds.	
25¢	4,634.25
Spillway tunnel excavation 554.3 cu. yds.	
5.00	2,771.50
	<hr/>
	\$241,826.20

For materials furnished on dam and
canals to date, consisting of cement,
timber, bolts, nails and hardware.... 41,149.78

[5]

Making a total for work done and mate-
rials furnished of.....\$1,215,015.04

Your orator further shows that all of said amounts
are computed from the estimates made by the en-
gineer in charge of said work.

Your orator further shows unto this Honorable
Court that while said written contract was not signed
until the 26th day of August, 1909, that your orator
commenced work on the 15th day of June, 1909, and
that all of said work done from the 15th day of
June, 1909, up to and including the 26th day of Au-
gust, 1909, was done at the special instance and
request of the said defendant Big Lost River Irriga-
tion Company, and under and pursuant to the terms
of the contract which bears date August 26th, 1909,
and that said contract, while it was not signed until
August 26th, 1909, the terms of said contract were
in full force and effect on the 15th day of June, 1909.

Your orator further shows unto this Honorable
Court that the defendant Big Lost River Irrigation

Company has failed, neglected and refused to make the payments to your orator as is required by said contract, and has failed, neglected and refused to make said payments to your orator from the 10th day of February, 1910, and on account of the neglect, refusal and failure of the said defendant Big Lost River Irrigation Company to make said payments, as provided in said contract, your orator has been compelled to stop work, and to discontinue furnishing materials and labor upon the irrigation system known as the Big Lost River Irrigation Company's system. That the failure to complete said canal system provided for in said contract has been entirely due to the fault and negligence of the said Big Lost River Irrigation Company in not performing its part of the contract as hereinbefore set out, and also in not furnishing material as agreed upon and also on account of the failure of the engineer in charge to make surveys and cross-sections of said work. [6]

Your orator further says that the said defendant Big Lost River Irrigation Company, had due notice of the performing of all the work and labor, and the furnishing of all the said materials, and the same was done, performed and furnished by your orator in the construction of said canal system, according to the terms of said contract.

Your orator further shows unto this Honorable Court that it has done work and furnished materials in the aggregate sum of \$1,215,015.04, and that it has been paid upon said claim the sum of \$689,398.09, and no more, and there is now due and owing to your orator, on account of said work and labor done and

materials furnished, the sum of \$525,616.95, together with interest as hereinafter set out.

Your orator further shows unto this Honorable Court that on or about the 20th day of August, 1910, the same being less than 90 days after the last work done and materials furnished, your orator filed for record in the office of the County Recorder of Blaine, Bingham, Custer and Fremont Counties, Idaho (those being the counties where said work was done), a statement containing notice of intention to hold and claim a lien, and a description of the property to be charged therewith, name of the owner or reputed owner, and name of the person by whom your orator was employed to do the work, with a statement of the terms and conditions of its contract, and an abstract of its indebtedness, showing the whole amount of the debt, and whole amount of credit, and the balance due or to become due to your orator, which statement was duly verified in accordance with law; that a copy of said statement or mechanic's lien is hereto attached to this bill, marked Exhibit "A," and is hereby referred to and is made a part of this bill of complaint, as though the same were fully set out in the body of this complaint.

Your orator further shows unto this Honorable Court that said statement or mechanic's lien was filed with the County Recorder [7] of Bingham County, State of Idaho, on the 25th day of August, 1910; in the County Recorder's office of Fremont County, State of Idaho, on the 23d day of August, 1910; in the County Recorder's office of Blaine County, State of Idaho, on the 20th day of August, 1910; in the

County Recorder's office of Custer County, State of Idaho, on the 27th day of August, 1910.

Your orator further shows unto this Honorable Court that the Big Lost River Irrigation Company had due notice of the performance of all of said work, and labor, and furnishing of all material, and that same was done, performed and furnished in the construction of said canal system, at the special instance and request of said defendant Big Lost River Irrigation Company.

Your orator further shows unto this Honorable Court that the property sought to be foreclosed under said mechanic's and contractor's lien so made and filed by your orator is as follows:

All of the following lands in Custer County, State of Idaho: The Northeast Quarter of the Southeast Quarter (N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the Southeast Quarter of the Northeast Quarter (S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of Section Five (5), the Northwest Quarter of the Northwest Quarter (N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$) and the South Half of the Northwest Quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest Quarter (S. W. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches and laterals, and, in general, the entire irrigation works,

project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation System, and any addition or extension thereto, [8] now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers, privileges and appurtenances connected therewith.

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1507.

Permit No. 1513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1513;

Permit No. 1748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 6 of Permits, at page 1748;

Permit No. 4061, being an amendment to Permit No. 1507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in

the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4061.

Permit No. 4062, being an amendment of Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4062;

Permit No. 4063, being an amendment to Permit No. 1748, to appropriate the waters of the Big Lost River and its tributaries, [9] as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4063.

Permit No. 4946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4946.

Permit No. 4,960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4,960.

That certain right of way for the Big Lost River Reservoir, situated in Townships 7 and 8, North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the

first day of August, 1905, and to the field-notes of the survey thereof, with witness points and witness corners of Townships 7 and 8, North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir, filed in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of [10] Idaho, approved by the Acting Secretary of the Interior August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost River Reservoir in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which

right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office, at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer, transferred and assigned to the company, for the construction of an irrigation system and works for the reclamation under the provisions of the Carey [11] Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the counties of Custer, Blaine, Bingham, and Fremont in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above-mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act constituting extensions or additions to its said present system.

All the contracts heretofore made by the company, or its predecessors in interest, or which may be here-

after entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the land irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

Your orator further shows unto this Honorable Court that it has fully kept and performed its part of said agreement and contract, and fully performed the labor and furnished the materials required of it.

Your orator, upon information and belief, alleges that under and by virtue of a certain deed of trust, dated July 1st, 1909, and recorded in the office of the County Recorder of Bingham County on the 3d day of September, 1909, and also recorded in Blaine County on the 3d day of September, 1909, and also recorded in Fremont County on the 4th day of September, 1909, and also recorded in the County Recorder's office of Custer County [12] on the 8th day of September, 1909, the defendant The American Trust and Savings Bank, a corporation, and Frank H. Jones, are, or attempted to be, made trustees for the defendant Big Lost River Irrigation Company, for the intent and purpose of granting to and authorizing The American Trust and Savings Bank and Frank H. Jones, as such trustees,

authority to secure and obtain a loan, and to authorize the issuing of two million dollars' worth of bonds. That under and by virtue of said deed of trust the said defendant Big Lost River Irrigation Company, as your orator is informed and believes, and therefore alleges the fact to be, conveyed to The American Trust and Savings Bank and Frank H. Jones, as such Trustees, all its right, title, claim and interest in and to said canal system, lands, rights of way and appurtenances, and being the property, or a portion of the property covered by your orator's said lien and hereinbefore described. Your orator further shows, upon information and belief, that said trust deed was not acknowledged until after the 26th day of August, 1909, and was not filed for record until after the 2d day of September, 1909.

And your orator further shows unto this Honorable Court that whatever right, title, claim or interest may be created by said deed of trust, or now had or held by The American Trust and Savings Bank and Frank H. Jones, as trustee, is subsequent, inferior and subject to the lien and claim of your orator herein. Your orator further alleges that said property as herein described is not separable, nor can the same be used, sold or realized upon in any other way than as an entirety.

Your orator further shows unto this Honorable Court that it has been compelled to and has employed counsel, and that for the services of said counsel in preparing said lien herein and foreclosing the same, that the sum of \$40,000.00 is a reasonable attorney's fee to be allowed herein.

Your orator further shows unto this Honorable Court that the last work done upon said canal by it was on the 15th day of August, 1910, and that by reason of the failure and neglect of [13] the said defendant Big Lost River Irrigation Company, to pay to your orator the sums of money due, that is to say, 90% on the 10th of each month for all work done for the preceding month, that there is due for interest as follows: On \$20,687.30 from February 10th, 1910, to August 15th, 1910, and on \$10,004.95 from March 10th, 1910, to August 15th, 1910, and legal interest on \$62,047.77 from April 10th, 1910, to August 15th, 1910, and legal interest on \$117,212.65 from May 10th, 1910, to August 15th, 1910, and legal interest on \$118,855.30 from June 10th, 1910, to August 15th, 1910, and legal interest on \$93,042.91 from July 10th, 1910, to August 15th, 1910.

Your orator further shows unto this Honorable Court that the system known as the Big Lost River Irrigation system is incomplete; that is to say, that the dam at Mackay is about half completed, and about 90% of all the ditches and canals are completed.

Your orator further shows unto this Honorable Court that the dam at Mackay, Idaho, is at this time in such condition that more money should be spent about it, in order to protect the work that has already been done.

Your orator further shows unto this Honorable Court that the Big Lost River Irrigation Company is insolvent, and unable to pay its debts, and that a receiver should be appointed for said corporation.

Your orator further shows unto this Honorable Court that no proceedings at law have been had, nor any suit or action commenced for or on behalf of your orator for the principal or interest due upon the claim owed by the defendant Big Lost River Irrigation Company, to your orator, except only this action.

In consideration whereof, and inasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly recognizable and relievable, your [14] orator therefore prays the aid of this Honorable Court that the mechanic's lien hereinbefore set out may be decreed to be a lien upon all the property of the defendant Big Lost River Irrigation Company, as described in said lien within the jurisdiction of this Honorable Court. That the said defendant Big Lost River Irrigation Company may be decreed to pay unto your orator the amount due upon the contract as hereinbefore set out and as secured by said mechanic's lien, to wit, the sum of \$525,616.95, together with legal interest thereon from the 15th day of August, 1910, together with interest upon the following amounts: On \$20,687.30 from February 10th, 1910, to August 15th, 1910, and on \$10,004.95 from March 10th, 1910, to August 15th, 1910, and on \$62,047.77 from April 10th, 1910, to August 15th, 1910, and on \$117,212.65 from May 10th, 1910, to August 15th, 1910, and on \$118,855.30 from June 10th, 1910, to August 15th, 1910, and on \$93,042.91 from July 10th, 1910, to August 15th, 1910, together with \$40,000.00 attorney's fee, and all costs and ex-

penses incurred and expended, and in default thereof that the said Big Lost River Irrigation Company, and all persons claiming under it, or either of them, may be forever debarred and foreclosed from all equity of redemption and claim of, in and to the said premises, and every part and parcel thereof, and all and singular the premises as covered by said mechanic's lien, with all the appurtenant property and effects, rights and franchises in said mechanic's lien mentioned, may be sold under a decree of this Honorable Court, and that out of the money arising from the sale thereof, after deducting from the proceeds of such sale just allowance for all disbursements and expenses of the said sale, including attorney's and counsel fees, to apply said proceeds to the payment of the amount due to your orator upon said contract, and said mechanic's lien, together with interest and costs. And your orator further prays that a receiver may be appointed according to the practice of this Court, with the usual powers of [15] receivers in like cases, of all property that is described in said mechanic's lien, and that the defendant Big Lost River Irrigation Company, and The American Trust and Savings Bank and Frank H. Jones, be decreed to make said transfer or conveyance to such receiver, and to the purchaser or purchasers of said property, at any sale as aforesaid as may be necessary and proper to put them, or either of them, in possession or control of said property. And your orator further prays that a decree of this Court be entered declaring whatever interest the defendants The American Trust and Savings

Bank, a corporation, and Frank H. Jones, may have in and to said property to be inferior and subsequent to plaintiff's claim.

And may it please your Honor to grant unto your orator a subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the defendants Big Lost River Irrigation Company, a corporation, The American Trust and Savings Bank, a corporation, and Frank H. Jones, therein and thereby commanding them, on a day certain therein to be named, and under a certain penalty, to be and appear before this Honorable Court, then and there to answer (but not under oath) all and singular the premises, and to stand, to perform and abide by the order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience.

And your orator will ever pray.

COREY BROS. CONSTRUCTION COMPANY,

By W. W. COREY, President,

Plaintiff.

H. H. HENDERSON,

Solicitor for Plaintiff, Postoffice Address, Ogden,
Utah, First National Bank Building. [16]

[Exhibit "A" to Bill of Complaint.]

State of Idaho,
Counties of Blaine, Bingham,
Custer and Fremont,—ss.

COREY BROS. CONSTRUCTION COMPANY,
a Corporation,

Claimant,

vs.

BIG LOST RIVER IRRIGATION COMPANY,
a Corporation,

Owner.

**NOTICE OF INTENTION TO HOLD AND
CLAIM A LIEN.**

TO WHOM IT MAY CONCERN:

NOTICE IS HEREBY GIVEN, that Corey Bros. Construction Company is now and was at all the times hereinafter set out, a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Ogden, Utah; and at all the times hereinafter set out, said company was and now is doing business in its corporate name in the counties of Blaine, Bingham, Custer and Fremont, State of Idaho; and at all said times has accepted the provisions of the Constitution and complied with the laws of the State of Idaho relative to foreign corporations doing business within said state.

That the Big Lost River Irrigation Company is now and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and as such

has been and now is doing business in its corporate name in said State of Idaho.

That the claimant Corey Bros. Construction Company, holds and claims and hereby gives notice of lien for materials furnished [18] and labor done and performed, at the special instance and request of said Big Lost River Irrigation Company, in the construction of that certain reservoir and canal system, known as the Big Lost River Irrigation Company's system, in the counties of Blaine, Bingham, Custer and Fremont, State of Idaho.

That the said Big Lost River Irrigation Company is now and was at all the times herein set out, the owner of said irrigation system, together with all the appurtenances thereunto belonging, or in anywise appertaining, and including the reservoirs, laterals, dams, headgates, irrigation system, rights of way, lands, interest in lands, and rights hereinafter referred to and described more fully, and all situated in said counties of Blaine, Bingham, Custer and Fremont, State of Idaho.

That the said Big Lost River Irrigation Company caused said reservoirs, canals, ditches, laterals, dams, headgates, irrigation system and works to be constructed.

That on the 26th day of August, 1909, said Big Lost River Irrigation Company signed a contract in writing with the said Corey Bros. Construction Company, a corporation, claimant, for the furnishing of materials, and the construction of its said canal system, together with the clearing, bond-plowing, excavation of canal, drain ditches, excavating water-

ways or waste ditches, building dams, reservoirs, rip-rap, and pumping of water, which contract is in words and figures as follows:

THIS AGREEMENT, made and entered into this 26th day of August, 1909, by and between COREY BROTHERS CONSTRUCTION COMPANY, hereinafter called the Contractor, having its principal place of business in the city of Ogden, State of Utah; and the BIG LOST RIVER IRRIGATION COMPANY, hereinafter called the Company, having its principal place of business in the city of Boise, State of Idaho, WITNESSETH:

THAT, WHEREAS, the Contractor has agreed to furnish all labor and appliances required, and to construct an earth dam, [19] diversion works, tunnel, canals, concrete structures, and all other work incidental to the completion, ready for operation, of the irrigation system of the Company all in accordance with plans and specifications prepared by the Engineer for said Company:

NOW, THEREFORE, in consideration of the covenants herein contained, the parties hereto agree each with the other, as follows:

1. Definition of Terms:

Wherever the term Contractor is used in this contract, it refers to and indicates Corey Brothers Construction Company.

Wherever the term Company is used in this contract, it refers to the Big Lost River Irrigation Company.

The term Engineer is used to designate the Consulting Engineer duly appointed and assigned by the

Company to have general charge of all work incidental to the construction of the Company's project ready for operation.

2. General.

The Contractor hereby covenants and agrees to provide all labor and all materials, not herein required to be furnished by the Company, necessary for the complete and substantial execution of everything described or reasonably implied in the following specifications, in strict accordance in all respects with the terms of this contract, and to the satisfaction and acceptance of the Engineer, including all transportation, apparatus and appliances of every kind requisite for the same.

The Contractor further covenants and agrees that the plans accompanying these specifications and referred to in these specifications are to be and are accepted as an essential part of this contract, the same as if written at length herein, it being distinctly understood that wherever the specifications conflict with this agreement, the terms of this agreement shall govern.

The several parts of this contract shall be taken together to explain each other, and to make the whole consistent. All [20] work that may be called for in the specifications and not drawn on plans, or drawn on plans and not called for in the specifications, is to be executed and furnished as if described in both these ways; and should any work or material which is not noted in the specifications and plans, but which is nevertheless necessary for the proper carrying out of the obvious intentions thereof and of this con-

tract, the same shall be deemed to be implied and required, and not to be an addition to or deviation from the work hereby contracted for, and the Contractor shall, without additional remuneration, perform all such work and furnish all such material as fully as if it were particularly delineated or described.

3. Subletting or Transferring of Contract:

The Contractor shall not sublet nor transfer this contract, or any part thereof, to any person, excepting for the delivery of material, without the consent and approval in writing of the Engineer, who shall be furnished with copies of contracts if he requires them. The Contractor shall give competent attention to the work, and shall also keep a thoroughly competent foreman constantly upon the work. No subcontract shall under any circumstances relieve the Contractor of his liability under this contract, should the subcontractor fail to perform the work undertaken by him.

4. Co-operation:

The Contractor shall co-operate with any other contractors that work on the premises, and arrange to carry on his work in such a manner that none of the other said contractors shall be unnecessarily hindered or delayed in the progress of their work.

5. Inspection:

The Supervising Engineer, or his duly authorized assistants, shall at all times have access to the work, which work is to be entirely under their control.

Any material or construction which does not fully accord [21] with the letter or the intent of these

specifications may be condemned by the Engineer or his representatives, and the Contractor shall immediately rectify or replace such defective work without expense to the Company.

6. Night and Day Work.

If so directed by the Engineer, the Contractor shall carry on the work day and night, in order to complete the same within the contract time, and no extra charge shall be made by the Contractor for such night work.

7. Time of Completion:

It is hereby expressly covenanted and agreed by the Contractor that all work pertaining to this contract shall be started within ten (10) days from the execution hereof, and carried forward to completion as rapidly as is consistent with the weather and other conditions, and completed before May 1st, 1910; provided that, if the Contractor is prevented from beginning or proceeding with said work at any time by reason of strikes, inevitable accident or casualty, the act of God, or for any cause over which the Contractor has no control, the time the Contractor shall be necessarily delayed by any of said causes shall be added to the time herein provided for the completion of said work.

8. Guaranties:

The Contractor agrees to defend any and all suits for alleged infringement of any process of construction or system furnished by him under the specifications, and further agrees to reimburse the Company for any and all expense resulting from litigation with reference thereto; provided, however, that nothing

in this paragraph contained shall require the Contractor to defend or to reimburse the Company for defending any suit resulting from or growing out of the use of any device specifically described in the specifications and required to be used or incorporated by the Contractor in said dam or other structures. [22]

The Contractor further guarantees all workmanship and all material furnished by him to be first class in every particular, and agrees to replace free of cost to the Company any part or piece showing defects of such material or workmanship within a period of one year from completion of the entire work, unless otherwise specified. The Contractor further agrees not to use any material, whether furnished by him or otherwise, known to him to be inferior or defective.

9. Bond:

The Contractor agrees upon the execution and delivery of this contract, if the Company so directs, to execute and deliver to the Company a good and sufficient bond of indemnity in amount equal to the

.....
and as security for the faithful performance by him of all the covenants and agreements he undertakes in this contract. The security in such bond of indemnity shall be a properly recognized surety corporation, and such security shall be such as shall be accepted and approved by the Engineer. It is understood that the cost of such bond, if required by the Company, shall be paid by the Big Lost River Irrigation Company.

10. Compensation:

In consideration of the faithful performance by the Contractor of all and singular the covenants and agreements herein contained, the Company agrees to pay the Contractor the following prices for doing the work, to wit:

Earth and gravel, to construct dam, \$0.25 per cubic yard.

Tunnel excavation at dam, \$5.00 per cubic yard.

Tunnel excavation in canal, \$6.00 per cubic yard.

Riprap per square yard (not hand laid), \$1.00.

Concrete of all kinds and structures, \$12.00 per cubic yard. [23]

Driving piling, cost plus 10%.

Solid rock excavation, \$1.50 per cubic yard.

Loose rock excavation, .50 per cubic yard.

Earth excavation in canal, .16 per cubic yard.

Clearing sage brush, \$6.00 per acre.

Lumber, in place, \$40.00 per thousand.

Wet excavation below river level, cost plus 10%.

Wash gravel, or 90% pure gravel, .25 per cubic yard.

Pumping of all kinds, cost plus 10%.

Any extra work ordered by Engineer, cost plus 10%.

Riprap, hand laid, \$1.00 per sq. yard.

Plus 110% cost of laying.

All material furnished by contractor, except lumber, cost of haul plus 10% cost of material.

The same classification of materials shall hold as stated in specifications for Mackay Dam.

On canal construction, the length of free haul shall be 200 feet, measured from center of gravity of em-

bankment to center of gravity of excavation. An allowance of $1\frac{1}{2}$ cts. per cu. yd. per 100 ft. overhaul shall be made.

For hauling cement from the nearest railroad station to the dam site, the contractor shall be allowed \$1.50 per ton; but all cement for canals shall be hauled by the contractor free.

Partial payments of ninety per cent. (90%) of the cost of the material furnished and work done (said payments to be based upon the contract prices covering the entire work) shall be made by the Company to the Contractor on or before the tenth day of each calendar month for all work done by the Contractor during the preceding calendar month; but said partial payments shall be made only on estimates by the Engineer of the amount of work done and material furnished and of the proper allowance hereunder for such work and material. Final payment of the balance of the contract prices shall be made by the Company to the Contractor within [24] sixty (60) days of the completion of the work and acceptance thereof by the Engineer, provided that first payment shall not become due until.....

11. Materials for Construction:

The following construction materials will be furnished by the Company:

All cement will be furnished f. o. b. cars at the nearest railroad station. The Contractor's price per cubic yard for placing concrete shall cover the unloading and storing of cement in a dry place until used, and shall include the proper care of and shipping back to the cement mill of all sacks, the freight

charges, however, being paid by the Company. Any loss of cement due to improper storage or carelessness on the part of the Contractor will be charged against the Contractor.

All steel reinforcement will be furnished f. o. b. cars at the nearest railroad station, and the price paid the contractor per pound for placing steel reinforcement will include the unloading from the cars and responsibility for the material until placed in the work.

All sheet piling, valves and structural steel, hereafter specified to be furnished the Contractor on items which are to be placed by force account will be furnished f. o. b. cars at the nearest railroad station, and the force account paid the Contractor for placing sheet piling shall include the unloading from the cars and responsibility for the material until placed in the work.

It shall be the duty of the Contractor to make requisition for materials furnished by the Company at such a date that the same can be furnished without delay to the work, and the Contractor shall hold the Company harmless for demurrage charges due to delay in unloading materials. [25]

12. Understanding of Plans and Specifications:

The Contractor hereby distinctly and expressly declares and acknowledges that, before the signing of this contract, he has carefully read the same and the whole thereof, together with and in connection with the set of plans and specifications herein referred to, and that he has made such examination of this contract and of such plans and specifications and such investigation of the work required to be done and of

the material required to be furnished as to enable him to thoroughly understand the intention of this contract and the requirements, covenants, agreements, stipulations and restrictions contained in this contract and in said plans and specifications, and distinctly agrees that he will not hereafter make any claim or demand upon the Company based upon or arising out of any alleged misunderstanding or misconception on his part of the said requirements, covenants, stipulations and restrictions.

13. Other Agreements:

It is understood that there are no written or verbal agreements outside of this contract.

IN WITNESS WHEREOF, the parties hereto have executed this instrument in duplicate the day and year first above written.

COREY BROTHERS CONSTRUCTION
COMPANY.

By W. W. COREY,
President.

Attest: R. D. ROBERTS,
Secretary.

BIG LOST RIVER IRRIGATION COM-
PANY.

By C. B. HURTT,
President. [26]

Attest: B. W. OPPENHEIM,
Secretary.

That the work and labor done and the materials furnished as aforesaid by the said Corey Bros. Construction Company, claimant, to the Big Lost River Irrigation Company, in the construction of its said

reservoirs, canals, ditches, dams, laterals, irrigation system, works and dykes is as follows:

Work Done on Canals to Date.

Force account and extra work cost plus	
10%.....	\$ 38,490.47
Earth excavation 1,306,914.3 cu. yds. @	
16¢.....	209,106.28
Gravel excavation 542,531.2 cu. yds. @	
25¢.....	135,632.80
Loose rock excavation 147,940.3 cu. yds.	
@ 50¢.....	73,970.15
Solid rock excavation 239,414.9 cu. yds.	
@ 1.50.....	359,122.35
Clearing 938.82 acres 6.00.....	5,632.92
Concrete 3,282.09 cu. yds. @ 12.00.....	39,385.08
Concrete (reinforced) 3,445.49 cu. yds. @	
12.50.....	43,068.63
Riprap, hand laid, 11,192.13 sq. yds. @	
1.00'.....	11,192.13
Bridging, 227,031.2 40.00 per thousand...	9,081.25
Tunnel excavation 1,146.8 cu. yds. @ 6.00.	6,880.80
Riprap, not hand laid, 476.2 sq. yds. @	
1.00.....	476.20
	<hr/>
	\$932,039.06

Work Done on Mackay Reservoir Dam to Date.

Force account and extra work, cost plus	
10%.....	17,130.65
Tunnel excavation portals, 24,162 cu. yds.	
50¢.....	12,081.00
Tunnel excavation portals, 2,304. cu. yds.	
1.50.....	3,456.00

Cut-off trench 1,544. cu. yds. @ 25¢.....	386.00
Core-wall excavation 390. cu. yds. @ 25¢..	97.50
Tunnel excavation 2,487.5 cu. yds. @ 5.00.	12,437.50
Earth embankment 479,908.0 cu. yds. @ 25¢.....	119,977.00
Loose rock embankment 9,000 cu. yds. @ 50¢.....	4,500.00
Concrete core-wall 2,080.2 cu. yds. @ 12.00.....	24,962.40
[27]	
Spillway excavation 5,855. cu. yds. @ 1.50.....	8,782.50
Concrete in tunnel and around outlet pipes 1755.2 cu. yds. @ 12.00.....	21,062.40
Concrete on face of Dam 763.8 cu. yds. 12.50.....	9,547.50
Coffer Dam embankment 18,537. cu. yds. 25¢.....	4,634.25
Spillway tunnel excavation 554.3 cu. yds. 5.00.....	2,771.50
	<hr/>
	\$241,826.20

For materials furnished on dam and
canals to date, consisting of cement,
timber, bolts, nails and hardware..... 41,149.78
Making a total for work done and mate-
rials furnished of.....\$1,215,015.04

Which said amount became due and owing, accord-
ing to the terms of said contract and agreement of
employment.

That the said materials furnished and labor done
and performed were reasonably worth, and accord-

ing to the terms and provisions of said contract and agreement amounted to said sum of \$1,215,015.04, and the said Big Lost River Irrigation Company promised and agreed to pay said amount therefor.

That the said Corey Bros. Construction Company was the original contractor and furnished all said work, labor and materials, at the special instance and request of the said Big Lost River Irrigation Company, and all such labor and materials were actually used in the construction of the system known as the Big Lost River Irrigation Company's system.

That the first work done and materials furnished by the Corey Bros. Construction Company was on the 15th day of June, 1909, and that the said last work done and materials furnished by the said Corey Bros. Construction Company on said canal system was on the 15th day of August, 1910.

That all the work done by the Corey Bros. Construction Company and materials furnished by said company from the 15th [28] day of June, 1909, up to the 26th day of August, 1909, was done at the special instance and request of the Big Lost River Irrigation Company, and under and pursuant to the terms of the contract, which bears date August 26th, 1909; August 26th, 1909, being the date on which said contract was signed between the said Corey Bros. Construction Company and the Big Lost River Irrigation Company; though said contract was not signed until August 26th, 1909, the same was in full force and effect from the 15th day of June, 1909, up to the signing of the same.

That the Big Lost River Irrigation Company has

failed, neglected and refused to make payments to the said Corey Bros. Construction Company of the payments due it, and have failed, neglected, and refused to make said payments from the 10th day of February, 1910, and on account of the neglect, refusal and failure of said Big Lost River Irrigation Company to make said payments as provided in said contract, said Corey Bros. Construction Company has been compelled to stop work, and to discontinue furnishing materials upon the irrigation system known as the Big Lost River Irrigation Company's system. That the failure to complete said canal system provided for in said contract, has been entirely due to the fault and negligence of the Big Lost River Irrigation Company in not performing its part of the contract.

That the said Big Lost River Irrigation Company had due notice of the performing of all work and labor, and the furnishing of all of said materials, and the same was done, performed and furnished in the construction of said canal system, according to the terms of said contract.

That on said amount so due and owing for work done and materials furnished as aforesaid, being the aggregate sum of \$1,215,015.04, the said Big Lost River Irrigation Company has paid to claimant the sum of \$689,398.09, and no more, and there [29] is now due and owing to the said Corey Bros. Construction Company, claimant, on account of said work and labor done and materials furnished the sum of \$525,616.95, after deducting all just credits and off-sets, together with interest as hereinafter set out, and a

lien is claimed therefor upon said Big Lost River Irrigation Company's system, and all the ditches, reservoirs, dams, laterals, water rights, works, rights of way, loose rock and masonry work, iron and wood structures, head-gates, lands, interest in lands and rights and property of every nature and appurtenant thereunto appertaining. Said property being more particularly described as follows:

All of the following lands in Custer County, State of Idaho: The Northeast quarter of the Southeast quarter (N. E. $\frac{1}{4}$ S. E. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the southeast quarter of the Northeast quarter (S. E. $\frac{1}{4}$ N. E. $\frac{1}{4}$) of Section Five (5), the Northwest quarter of the Northwest quarter (N. W. $\frac{1}{4}$ N. W. $\frac{1}{4}$) and the South half of the Northwest quarter (S. $\frac{1}{2}$ N. W. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest quarter (S. W. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches, and laterals, and, in general, the entire irrigation works, project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation System, and any addition or extension thereto, now constructed by the Company, or which it may hereafter construct or acquire, together with all franchises and powers, privi-

leges and appurtenances connected therewith. [30]

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1507;

Permit No. 1513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at page 1513;

Permit No. 1748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 6 of Permits, at page 1748;

Permit No. 4061, being an amendment to Permit No. 1507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4061;

Permit No. 4062, being an amendment of Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4062;

Permit No. 4063, being an amendment to Permit No. 1748, to appropriate the waters of the Big Lost River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4063;

Permit No. 4946, to appropriate the waters of Big Lost River [31] and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4946;

Permit No. 4960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4960.

That certain right of way for the Big Lost River Reservoir, situated in Townships 7 and 8, North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2nd, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field-notes of the survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir, filed in the United States Land Office, at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior August 2nd, 1906, for a more particular description of which right of was reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost River Reservoir in Sections 21 and 28, Township 3 North, Range 27 [32] East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 26th, 1906, for a more particular description of which right of was reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which

reservoir reference is hereby made to the map and field-notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the Company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer transferred and assigned to the Company, for the construction of an irrigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the Counties of Custer, Blaine, Bingham and Fremont in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the Company, and any amendment to the above mentioned present contract, for the construction of irrigation [33] works and system in Idaho under the Carey Act, constituting extensions or additions to its said present system.

All the contracts heretofore made by the Company, or its predecessors in interest, or which may be hereafter entered into by the Company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the lands irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition

made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

WHEREFORE, Corey Bros. Construction Company, a corporation, claimant, hereby claims and gives notice that it holds and claims a lien upon the Big Lost River Irrigation Company's canal system, and upon all appurtenances thereunto appertaining, as hereinbefore enumerated, and upon the whole thereof, for the said sum of \$525,616.95, together with legal rate of interest thereon from the 15th day of August, 1910, and also legal interest on \$20,687.30 from February 10th, 1910, to August 15th, 1910, and on \$10,004.95 from March 10th, 1910, to August 15th, 1910, and legal interest on \$62,047.77 from April 10th, 1910, to August 15, 1910, and legal interest on \$117,212.65 from May 10th, to August 15, 1910, and legal interest on \$118,855.30 from June 10th, 1910, to August 15th, 1910, and legal interest on \$93,042.91 from July 10th, 1910, to August 15th, 1910, under and by virtue of the provisions of the Statutes of Idaho relating to liens and preferred claims of mechanics and others in such cases made and provided. [34]

Dated this 19th day of August, 1910.

COREY BROS. CONSTRUCTION COMPANY,

By W. W. COREY,

President and General Manager.

[Seal] Attest: A. T. COREY,

Secretary.

State of Utah,
County of Weber,—ss.

Warren W. Corey, being first duly sworn, deposes and says: That he is President and General Manager of the Corey Bros. Construction Company, a corporation, original contractor herein, claimant in the foregoing notice of lien, and as such is authorized to make and verify this lien; that he has read the above and foregoing claim and notice of lien, and knows the contents thereof, and the same is true and just, and the statements therein contained of the demand and claim of said Corey Bros. Construction Company against the Big Lost River Irrigation Company for work and labor performed and materials furnished upon and in the construction of said canal system are correct, and the work and labor has been done and performed, and materials furnished as therein stated, and there is now due and owing to the said Corey Bros. Construction Company from the said Big Lost River Irrigation Company for said work performed and materials furnished, the sum of \$525,616.95, and interest as above set out, after deducting all just credits and off-sets.

W. W. COREY.

Subscribed and sworn to before me this 19th day of August, 1910.

My commission expires Dec. 9th, 1910.

[Seal]

JOHN C. DAVIS,
Notary Public.

[Endorsed]: Filed Oct. 15, 1910. A. L. Richardson, Clerk. [35]

[Title of Court and Cause.]

**The Separate Answer of the Big Lost River
Irrigation Company, a Corporation, to the
Above-entitled Bill of Complaint.**

I.

Now comes the Big Lost River Irrigation Company, a corporation, and saving and reserving to itself all manner of benefit and advantage of exception to the numerous errors, uncertainties and insufficiencies in the said bill of complaint contained with like effect as if this defendant had demurred thereto, for answer to the said bill of complaint, or to such parts thereof as this defendant is advised it is necessary or material for it to make answer unto, answering says:

II.

1. This defendant is not advised, save by the allegations of the said bill of complaint, whether or not the complainant is a corporation organized under the laws of the State of Utah or whether it is a resident or citizen of the State of Utah and prays that the said complainant may be required to make strict proof of its allegations in that behalf. [36]

2. Further answering, this defendant says that it is not advised, save by the allegations of said bill, as to whether the complainant in said bill has complied with the provisions of the Constitution and laws of the State of Idaho relative to foreign corporations, nor is this defendant advised as to whether or not the complainant was, at the time of the filing of the bill of complaint, or at the time of the doing of the

alleged work in said bill of complaint described, authorized to carry on business or maintain suits within the State of Idaho or in this court and the defendant prays that the complainant may be required to make strict proof of its allegations in that regard.

3. Further answering, this defendant says that it is not advised, save by the allegations of said bill, as to what work, if any, has been done by the complainant on account of the construction of the, or any, dam or canals for this defendant nor as to what was the contract price or cash value of such work, if any, so performed by complainant and this defendant prays that said complainant may be required to make strict proof of the allegations of its bill in that behalf.

4. Further answering, this defendant says that it is advised and believes and therefore alleges the fact to be that any contract in writing entered into between the complainant and this defendant was valid and binding only from the date of its execution and delivery.

5. Further answering, this defendant denies that the failure to complete the canal system provided for in the contract referred to in the bill of complaint has been due to the fault or negligence of this defendant in not performing its part of the contract, as set out in said complaint, and in not furnishing material or on account of any failure of the engineer in charge to make surveys and cross-sections of said work. [37]

6. Further answering, this defendant denies that

plaintiff has done work and furnished materials, or has done work or furnished materials, under the contract referred to in the bill of complaint, in the aggregate sum of One Million Two Hundred Fifteen Thousand Fifteen Dollars Four Cents (\$1,215,015.04) and denies that the sum of Five Hundred Twenty-five Thousand Six Hundred Sixteen Dollars Ninety-five Cents (\$525,616.95), together with interest thereon, is now due and owing by this defendant to plaintiff on account of work and labor done and materials furnished, as alleged in said complaint.

7. Further answering, this defendant says that it is not advised, save by the allegations of the said bill of complaint, as to whether or not the said complainant has filed for record any notices whatsoever of intention to claim a lien in any county in the State of Idaho, or as to what are the contents of any purported notices of lien claimed to have been so filed, nor is this defendant advised, save by the allegations of said bill, as to whether or not the, or any, purported copy of said, or any, notice attached to the said bill of complaint is in fact a true copy of any notice actually filed, as alleged in said bill of complaint, and this defendant prays that the complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

8. Further answering, this defendant denies that plaintiff has a mechanic's or contractor's lien upon all or any contracts heretofore made by this defendant company, or its predecessor in interest, or upon any contracts which it may hereafter enter into with settlers, for the sale of water rights or water to be

taken from or through the irrigation system described in the said complaint, as the same is now or may be hereafter constructed, and denied that plaintiff has, or is entitled to, a lien upon any mortgages constituting, to the extent of the unpaid [38] portion of the purchase price of such water rights, first liens on the land irrigated thereunder; but this defendant avers that all such contracts and mortgages have been, and were, by this defendant company, at various times during the progress of the work and the furnishing of materials referred to in the bill of complaint, assigned for value and delivered to The American Trust and Savings Bank and Frank H. Jones, trustees, as additional and collateral security for the payment of certain bonds issued by this defendant company for the purpose of procuring the money wherewith to construct said irrigation system and that the moneys admitted by said plaintiff to have been received by it from this defendant company on account of such work, labor and materials were, to a large extent, the proceeds of the sales of bonds of this company secured in part by the transfer, assignment and delivery to said trustees of the contracts and mortgages referred to and the said contracts and mortgages are now held and owned by the said trustee for the purpose for which the same were so transferred, assigned and delivered.

9. Further answering, denies that plaintiff has fully kept and performed its part of the agreement and contract referred to in the bill of complaint or has fully performed the labor and furnished the ma-

terials required by it.

10. Further answering, this defendant denies that the sum of Forty Thousand (\$40,000) Dollars is a reasonable attorneys' fee to be allowed to plaintiff in this action.

11. Further answering, this defendant denies that the dam at Mackay, Idaho, constituting a part of the irrigation system of this defendant, was, at the time of the filing of the bill of complaint, or is now, in such condition that more money should be, or is required to be, spent upon it in order to protect the work that has already been done thereon. [39]

As to each of the allegations of the bill of complaint herein not in this answer expressly admitted or denied, this defendant prays that the complainant may be required to make strict proof of each of such allegations of said bill of complaint as against this defendant.

WHEREFORE, this defendant prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

BIG LOST RIVER IRRIGATION COM-
PANY,

By C. B. HURTT,
President.

N. M. RUICK,

Attorney for Defendant, Big Lost River
Irrigation Company. [40]

[Endorsed]: Filed Feb. 6, 1911. [41]

[Title of Court and Cause.]

Answer of Continental and Commercial Trust & Savings Bank and Frank H. Jones.

THE JOINT AND SEVERAL ANSWER OF THE CONTINENTAL AND COMMERCIAL TRUST & SAVINGS BANK, FORMERLY THE AMERICAN TRUST AND SAVINGS BANK, A CORPORATION, AND FRANK H. JONES, DEFENDANTS, TO THE ABOVE-ENTITLED BILL OF COMPLAINT.

Now come the Continental and Commercial Trust & Savings Bank, formerly The American Trust and Savings Bank, and Frank H. Jones, and saving and reserving to themselves all manner of benefit and advantage of exception to the numerous errors, uncertainties and insufficiencies, in the said bill of complaint contained, with like effect as if these defendants had severally demurred thereto, for answer to the said bill of complaint, or to such parts thereof as these defendants are advised it is necessary or material for them to make answer unto, answering say:

1. These defendants are not advised, save by the allegations of the said bill of complaint, whether or not the [42] complainant is a corporation, organized under the laws of Utah, or whether it is a resident or citizen of the State of Utah, and pray that the said complainant may be required to make strict proof of its allegations in that behalf; but these defendants admit that the defendant The Continental and Commercial Trust & Savings Bank, under its former name of The American Trust & Savings

Bank, was at the time of the filing of the bill of complaint herein, and still is, a citizen and resident of the State of Illinois, and that the defendant Frank H. Jones is also a citizen and resident of the State of Illinois.

2. Further answering, these defendants say that they are not advised, save by the allegations of said bill, as to whether the complainant in said bill has complied with the provisions of the Constitution and laws of the State of Idaho relative to foreign corporations, nor are these defendants advised as to whether or not the complainant was at the time of the filing of the bill of complaint, or at the time of the doing of the alleged work in said bill of complaint described, authorized to carry on business or maintain suits within the State of Idaho, or in this court, and the defendants pray that the complainant may be required to make strict proof of its allegations in that regard.

3. Further answering, these defendants say that they are not informed save by the allegations of the bill of complaint herein as to whether or not the defendant, Big Lost River Irrigation Company, entered into any contract with the said complainant upon the 26th day of August, 1909, or at [43] any other time, nor are these defendants advised as to the terms of any such alleged contract nor whether any such supposed contract purporting to be the contract of the Big Lost River Irrigation Company was in fact the valid and properly executed and binding contract of said Big Lost River Irrigation Company, nor as to the terms of payment, or the price to

be paid for any work alleged to be done under any such contract, and these defendants pray that the said complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf as against these defendants.

4. Further answering, these defendants say that they are not advised save by the allegations of said bill, as to what work, if any, has been done by the complainant upon account of the construction of any dam or canals for the Big Lost River Irrigation Company, nor as to what was the contract price or cash value of such work, if any, as has been done by said complainant; and these defendants pray that the said complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf.

5. Further answering, these defendants say that they are advised and believe, and therefore allege the fact to be that any contract in writing entered into between the complainant and the said Big Lost River Irrigation Company was valid and binding only from the date of its execution and delivery.

6. Further answering, these defendants say that they are not advised save by the allegations of said bill of complaint as to what defaults, if any, have been [44] made by the Big Lost River Irrigation Company in any dealings between the complainant and said company, nor as to what sums, if any, are due from the Big Lost River Irrigation Company to the said complainant; and these defendants pray that the complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

7. Further answering, these defendants say that they are not advised, save by the allegations of the said bill of complaint, as to whether or not the said complainant has filed for record any notices whatsoever in any county in the State of Idaho, or as to what are the contents of any purported notices claimed to have been so filed in any county in said State, nor are these defendants advised, save by the allegations of said bill, as to whether or not any purported copy of any notice attached to the said bill of complaint, is in fact a true copy of any notice actually filed, and these defendants pray that the complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

8. Further answering, these defendants say that it is true that under and by virtue of a certain deed of trust, dated the 1st day of July, A. D. 1909, and duly executed by the Big Lost River Irrigation Company, by its proper officers thereunto duly authorized, and attested by its corporate seal, the said Big Lost River Irrigation Company, which was then the true and lawful owner of the property in said deed of trust described and duly authorized to convey the same as therein set forth, did grant, bargain, sell and convey to these defendants, [45] in trust, all and singular the following described property, that is to say:

(1) All the following lands in Custer County, State of Idaho: The Northeast Quarter of the Southeast Quarter (N.E. $\frac{1}{4}$, S.E. $\frac{1}{4}$) of Section Three (3) Lot Three (3) of Section Four (4), the Southeast Quarter of the Northeast Quarter (S.E. $\frac{1}{4}$, N.E.

$\frac{1}{4}$) of Section Five (5), the Northwest Quarter of the Northwest Quarter (N.W. $\frac{1}{4}$, N. W. $\frac{1}{4}$) and the South Half of the Northwest Quarter (S. $\frac{1}{2}$, N.W. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest Quarter (S.W. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

The foregoing lands lie in the bed of the proposed reservoir of the company and are owned by it in fee, which lands upon the construction of the company's impounding dam will be flooded, and will then become and thereafter be lands under water, forming an integral part of said irrigation system, said lands being hereby conveyed and mortgaged subject to the right of the company to proceed with the completion of its irrigation system and works.

(2) All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches, and laterals, and, in general, the entire irrigation works, project and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation system, and any addition or extension thereto, now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers, privileges and appurtenances connected therewith.

(3) All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State

vs. Corey Bros. Construction Company et al. 53
of Idaho and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at Page 1507;

Permit No. 1513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at Page 1513; [46]

Permit No. 1748, to appropriate the waters of Big Lost River, and its tributaries, to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 6 of Permits, at Page 1748;

Permit No. 4061, being an amendment to Permit No. 1507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho in Book 11 of Permits, at Page 4061;

Permit No. 4062, being an amendment of Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 11 of Permits, at Page 4062;

Permit No. 4063, being an amendment to Permit No. 1748, to appropriate the waters of the Big Lost

River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 11 of Permits at Page 4063;

Permit No. 4946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at Page 4946;

Permit No. 4960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at Page 4960;

(4) That certain right of way for the Big Lost River reservoir, situated in Townships 7 and 8 North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field-notes of a survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir filed in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

[47]

(5) That certain right of way for the Big Lost River canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

(6) That certain right of way for the lower Big Lost River reservoir in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office, at Hailey, Idaho.

(7) That certain right of way for the lower Big Lost River canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office, at Hailey, Idaho.

(8) That certain right of way for the Antelope reservoir, situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June

18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field-notes hereof, filed in said land office on said day.

(9) All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract, dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer transferred and assigned to the company, for the construction of an irrigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River valley in the counties of Custer, Blaine, Bingham and Fremont, in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above-mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act, constituting extensions or additions to its said present system. [48]

(10) All the contracts heretofore made by the company, or its predecessors in interest, or which may be hereafter entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the lands irrigated thereunder, which

may be deposited with the trustee hereunder, in accordance with the provisions hereof.

(11) All right, title and interest in and to said Idaho State Desert Land List, No. 31, and the proposition made by said George S. Speer, under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

And these defendants say that the said deed of trust was duly executed and acknowledged by the said Big Lost River Irrigation Company and by these defendants, and was duly approved by the Attorney General of the State of Idaho, on the 27th day of August, A. D. 1909, and was duly recorded in the Recorder's office in the County of Blaine, in the State of Idaho, on the 3d day of September, 1909, and was also recorded in the Recorder's Office of the County of Bingham on the 3d day of September, 1909, and was also duly recorded in the Recorder's office of the County of Fremont, in the State of Idaho, on the 4th day of September, 1909, and was also duly recorded in the Recorder's office of the County of Custer, and State of Idaho on the 8th day of September, 1909, and from the said date of said deed and the respective records thereof, has been and still is a valid and subsisting first lien upon the property therein described, as these defendants are informed and believe, and therefore state the fact to be. And these defendants pray leave to refer to the original of said mortgage or deed of trust and the record thereof, as [49] the same is spread of record in the Recorder's Office of said respective coun-

ties, in the State of Idaho, with like effect as if these defendants had set forth the said deed of trust and each of the provisions thereof, according to its and their legal effect in this answer.

9. These defendants further show that in and by the said deed of trust it was, among other things, provided in addition to the said conveyance of the said property hereinbefore described, that the said Big Lost River Irrigation Company should assign to and deposit with these defendants as trustees, as additional security for the payment of bonds of the par value of Two Million Dollars (\$2,000,000.00) in said trust deed authorized to be issued, all contracts for the purchase of water rights for the irrigation of portions of the land described in Idaho State Desert Land Lists, numbered 8, 18, and 31, which contracts were and are known as settlers' contracts, and these defendants aver that in fact there have been issued and certified by these defendants, and are now outstanding, bonds of the par value of One Million Three Hundred Seventy-eight Thousand Five Hundred Dollars (\$1,378,500.00), all of which, together with interest due and accrued thereon, now remain wholly outstanding and unpaid, and these defendants state that there have been duly assigned and deposited with these defendants all of the said settlers' contracts, as these defendants are informed and believe, and therefore allege, which have been issued or executed by said Big Lost River Irrigation Company, and these defendants are informed and believe, and therefore state the fact to be, that the said deed of trust or mortgage [50] and the said

bonds are a valid and subsisting first lien, not only upon the property in said deed of trust and hereinbefore described, but upon the said settlers' contracts, and each thereof, and that the lien of the said mortgage or deed of trust and of the said bonds secured thereby is, as these defendants are informed and believe and therefore allege the fact to be, prior to any claim or demand on the part of the said complainant herein; and these defendants upon information and belief, deny that the claim of these defendants, as trustees, and the interest created by said deed of trust, is in any way subsequent, inferior or subject to the lien and claim of the complainant herein.

10. Further answering, these defendants say that afterwards and on or about the 1st day of January, A. D. 1910, the said Big Lost River Irrigation Company duly executed to these defendants (the defendant, The Continental and Commercial Trust & Savings Bank being then named and called The American Trust & Savings Bank), its certain mortgage, denominated a collateral trust mortgage, to secure its collateral trust bonds, for the aggregate sum of Four Hundred Thousand Dollars (\$400,000.00), with interest evidenced by coupons thereto attached, at the rate of six (6) per cent per annum, which said collateral trust mortgage was duly recorded in the Recorder's Office of the County of Blaine, on the 28th day of March, 1910, and duly recorded in the Recorder's Office of the County of Bingham on the 28th day of March, 1910, and duly recorded in the Recorder's Office of the County of Custer, on the 1st day of April, 1910, and [51] duly recorded in the

Recorder's Office of the County of Fremont, on the 8th day of April, 1910; in and by which said collateral trust mortgage the said Big Lost River Irrigation Company assigned, transferred and conveyed to these defendants all and singular the same property theretofore conveyed to these defendants under said deed of trust hereinbefore described, but in said collateral trust mortgage it was especially provided and set forth that the conveyance therein made and the security thereby given for the said Four Hundred Thousand Dollars (\$400,000.00) of collateral trust bonds was and should be subject to the prior accruing indebtedness of the said deed of trust, dated July 1st, 1909, and hereinbefore described; and these defendants say that subject to the security and lien of the said deed of trust of July 1st, 1909, as hereinbefore described, and subject to the lien thereby created, the said Big Lost River Irrigation Company by its said collateral trust mortgage, conveyed all and singular the said property upon substantially the same terms and conditions as in said deed of trust of July 1st, 1909, as hereinbefore set forth, contained, and these defendants say that under said collateral trust mortgage there were issued and are now outstanding, collateral trust bonds of the par value of Two Hundred Thousand Dollars (\$200,000.00), together with coupons now overdue and unpaid thereon, evidencing the interest thereon, which said collateral trust mortgage and the bonds secured thereby are, as these defendants are informed and believe, and therefore allege the fact to be, a lien upon all the property in said mortgage described

and upon said settlers' contracts, subsequent only to the lien of the said [52] deed of trust of July 1st, 1909, and are prior to any claim or demand on the part of said complainant herein, and these defendants, upon information and belief, deny that the claim of these defendants, as trustees, under said collateral trust mortgage and the interest created by said collateral trust mortgage is in any way subsequent, inferior, or subject to the lien and claim of the complainant herein.

11. Further answering, these defendants say that they are not advised, save by the allegations of said bill, as to whether or not the property in said bill of complaint described is separable or can be sold in parcels or lots, and in so far as the complainant may be advised that such allegation is necessary or material, these defendants pray that the complainant may be required to make strict proof thereof.

12. Further answering, these defendants say that they are not informed, save by the allegations of said bill of complaint, as to what, if any, attorneys' fees were incurred by the said complainant, nor as to what would be a reasonable and proper fee for the said complainant's attorneys; wherefore these defendants neither admit nor deny the allegation of the said bill of complaint in that respect, but these defendants deny that any such solicitors' fee is a lien upon said premises, as against the lien of the said bonds and deed of trust and collateral trust mortgage hereinbefore described.

13. Further answering, these defendants neither admit nor deny the allegations of the said bill of the

complaint, as to any alleged interest therein claimed to be due [53] from the Big Lost River Irrigation Company to the complainant therein, and pray that the complainant be required to make strict proof thereof.

14. Further answering, these defendants say that they are not informed save by the allegations of the said bill of complaint as to the condition of the said dam therein described, nor as to whether or not additional work is required to be done upon said dam in order to protect the same; nor as to whether or not the said Big Lost River Irrigation Company is insolvent, nor as to whether or not the complainant has commenced any other proceeding at law or in equity to collect any alleged indebtedness claimed to be owing to it; wherefore these defendants neither admit nor deny the allegations of the bill of complaint in that regard, but pray that the complainant may be required to make strict proof of each of said allegations.

15. Further answering, these defendants say that they are informed and believe, and therefore allege the fact to be, that under the laws of the State of Idaho, and under the laws of the United States of America, the said complainant is not entitled to any mechanic's lien upon the said property in said bill of complaint described, as against the said settler's contracts hereinbefore referred to, or as against the bonds and deed of trust and collateral trust mortgage hereinbefore described, and these defendants pray the same advantage of this claim of defense as if these defendants had demurred to the said bill of complaint upon that ground.

16. Further answering, these defendants say that they are informed and believe, and therefore state the fact [54] to be that the proceeds of these said bonds so issued and outstanding and secured by the said deed of trust as hereinbefore set forth, and by the assignment of the said settlers' contracts, were used in and about the work of constructing said irrigation works and dam, and that large amounts of the proceeds of said bonds have been paid to the complainant herein, and that, as to so much of the proceeds of said bonds as have been so applied to the payment of the cost of constructing said dam and irrigation works, and as to so much of the proceeds of said bonds as have been applied to the payment of the said complainant for work done by it upon said irrigation works and dam, these defendants, as trustees for said bondholders, are entitled in equity and good conscience to a lien upon all of said property, at least co-ordinate with any lien claimed by the said complainant, apart from the rights arising under the execution and record of said deed of trust hereinbefore referred to, and arising from the assignment and deposit of the settlers' contracts aforesaid.

17. Further answering, these defendants say that under and by virtue of the terms of the said deed of trust and collateral trust mortgage, these defendants, upon any default on the part of the said Big Lost River Irrigation Company are entitled to the possession and control of all the property in said deed of trust and collateral trust mortgage described, and these defendants allege that under the said provisions of said deed of trust and collateral trust mortgage, these defendants are entitled to the possession and

control of all the property in said bill of complaint described, as against the said complainant therein, or as [55] against any person appointed as receiver under the said bill of complaint herein, and these defendants pray that their rights in that regard may be protected in any order which may be entered herein, pending the further hearing of this suit upon the prayer of the bill of complaint herein, for the appointment of a receiver, or otherwise.

As to each of the allegations of the bill of complaint herein, not in this answer expressly admitted or denied, these defendants pray that the complainant may be required to make strict proof of each of such allegations of said bill of complaint as against these defendants.

WHEREFORE, having fully answered the bill of complaint filed herein, these defendants pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

CONTINENTAL AND COMMERCIAL
TRUST & SAVINGS BANK,
Formerly THE AMERICAN TRUST AND
SAVINGS BANK,

By JOHN J. ABBOTT,
Vice-President.

[Seal] Attest: FRANK H. JONES,
Secretary.

FRANK H. JONES.

MAYER, MEYER, AUSTRIAN & PLATT,
N. M. RUICK,

Solicitors, and of Counsel. [56]

[Endorsed]: Filed February 6, 1911. [57]

[Title of Court and Cause.]

Amendments to Answer.

And now come the Continental and Commercial Trust and Savings Bank (formerly The American Trust and Savings Bank) and Frank H. Jones, defendants in the above cause, and move the Court for leave to file the following amendments to the answer filed in this cause on the 6th day of February, A. D. 1911, to wit: Add at the close of paragraph 17 of said answer the following paragraphs:

18. Further answering, these defendants say they are informed and believe and so allege the fact to be that the said plaintiff wholly failed to do and perform the construction work referred to in the amended bill of complaint, and for which the said plaintiff seeks to foreclose its alleged lien, in the form [58] or manner or at the time required by the contract between the said plaintiff and the said Big Lost River Irrigation Company, or in accordance with the terms thereof or the specifications therein contained or therein referred to. And by reason of the default, failure and neglect of the said plaintiff to do and perform such work, or carry out its said contract in the manner, at the time, and in accordance with the terms of said contract, the said defendant, Big Lost River Irrigation Company, suffered great loss, damage and injury; and by reason of the said failure, negligence, and default of said plaintiff, the State Board of Land Commissioners of the State of Idaho, and the State Engineer of the State of Idaho ordered and directed the said Big Lost River Irrigation

Company to discontinue work on said Mackay dam, and said irrigation system cannot be utilized or turned to account without the completion of said dam. And the said Big Lost River Irrigation Company was thereupon compelled to cease operations and further construction on said dam because of the failure of the said plaintiff to construct the said dam, or so much thereof as had been constructed at the time the said Big Lost River Irrigation Company was ordered and directed as aforesaid to cease construction thereon, in accordance with the terms and conditions of said contract and of the specifications thereof or therein referred to. And the said Big Lost River Irrigation Company will not be permitted, as these defendants are informed and believe, by the State of Idaho or the State Board of Land Commissioners or the State Engineer of said State to proceed with the completion of said dam without materially changing and reconstructing a large part of the work done by the said plaintiff, and for which it seeks to foreclose its said alleged lien; and by reason of the said default, failure, and neglect of plaintiff the said Big Lost River Irrigation Company became unable to borrow money or raise funds to proceed with the reconstruction of said dam and with the completion of said irrigation system, and the insolvency and inability of said company to meet its obligations [59] and pay its debts is due, as these defendants are informed and believe and so allege the fact to be, to the default and failure of said plaintiff to observe the terms of said contract and to do and to perform the work required of it thereunder in accordance

with the terms thereof and the specifications therein set forth, or therein referred to. That the loss and damage so sustained by the said Big Lost River Irrigation Company, and the depreciation of the assets of said company, securing its said first mortgage bonds, exceed, as these defendants are informed and believe, the amount claimed by the said plaintiff in its amended bill of complaint as due it from said Big Lost River Irrigation Company, and for which it seeks to foreclose its said lien; that by reason of the premises and the defaults, failures and neglects of the said plaintiff it is not entitled to and should not be decreed a lien for any sum whatsoever upon any of the property, rights, franchises or assets of said Big Lost River Irrigation Company.

19. Further answering, these defendants say that said Big Lost River Irrigation Company was incorporated under the laws of the State of Idaho on or about the 15th day of June, 1909, but no meeting of the stockholders, incorporators or directors of said company was held and no officers thereof were elected until on or about the 16th day of July, 1909, on which last-mentioned date the incorporators of said company elected a board of directors and authorized the exchange of substantially all of the capital stock of said company for the irrigation system described in the amended bill of complaint, which system, or a large part thereof, was then owned by one George S. Speer, who offered to exchange the same for the capital stock of said Big Lost River Irrigation Company. That at the meeting of the directors of said company, held on said date, no other action or busi-

ness was transacted than to elect officers and to accept the proposition of said George S. Speer to transfer to the company said irrigation works, or a large [60] part thereof, in exchange for substantially all of the capital stock of said Company, and said Big Lost River Irrigation Company had no interest whatsoever in said irrigation works until on or after said 16th day of July, 1909, and no contract for the construction of such works was authorized or considered at said meeting. That neither the directors nor the stockholders of said Big Lost River Irrigation Company held any meeting from the 16th day of July, 1909, until the 21st day of August, 1909, on which last-mentioned date a special meeting of the board of directors of said company was duly and legally called and held for the purpose of authorizing the issuance of the first mortgage bonds of said corporation to the amount of \$2,000,000.00, and for securing the payment thereof by a first mortgage or deed of trust upon all the property and assets of said corporation, and for the further purpose of authorizing the contract with the said plaintiff for the construction of said irrigation works. That at said meeting of the board of directors said board by resolution duly authorized the officers of said company to issue and deliver the first mortgage coupon bonds thereof to the amount aforesaid, and to secure the payment thereof by a first mortgage and deed of trust upon all the property, rights and franchises of said Big Lost River Irrigation Company. That the bonds so authorized to be issued and secured are the identical bonds held by the bondholders of said

Big Lost River Irrigation Company represented by these defendants, and for whom these defendants appear and defend in this suit. That after having authorized the issuance of said bonds and the execution and delivery of such first mortgage and deed of trust, the said directors further authorized the officers of the company to enter into a contract on behalf of the company with the said plaintiff for the construction of certain irrigation works. That the action of the directors in authorizing the issuance of said bonds and the execution of such first mortgage [61] and deed of trust to secure the same, was on said 21st day of August, 1909, ratified and approved by the stockholders of said company, duly assembled in a special meeting for such purpose.

That no contract with plaintiff had theretofore been authorized or entered into on behalf of said Big Lost River Irrigation Company by any of the officers of said company, or by the board of directors or stockholders thereof, and the said plaintiff had no contract whatsoever, either oral or written, with said Big Lost River Irrigation Company until after the 21st day of August, 1909; and the said plaintiff, as these defendants are informed and believe and so charge the fact to be, entered into its said contract with the Big Lost River Irrigation Company with full notice and knowledge that said Big Lost River Irrigation Company had first authorized and directed the issuance of its first mortgage bonds to the amount of \$2,000,000.00 to be secured by a first mortgage or deed of trust upon all the assets, property, rights and franchises of said corporation, and

that said plaintiff, its officers and agents, as these defendants are informed and believe, at all times knew that said bonds would be negotiable in character, and were and would be sold to the public as the first mortgage bonds of said Big Lost River Irrigation Company, and that they purported to be and were represented to be secured by first mortgage and deed of trust upon all its said property, rights and franchises, and that they were and would be sold to innocent purchasers for value under such representations and statements, and that the purchasers of such bonds purchased the same believing such statements and representations to be true, and that they would not have purchased such bonds had they known that such bonds were not secured by a first and prior lien upon all the property and assets of said corporation, or that the said plaintiff had or would claim a first and prior lien upon said property, rights and franchises. [62]

That the bonds of said Big Lost River Irrigation Company, purporting to be secured as aforesaid, were sold under the circumstances and representations stated, with the full knowledge of the said plaintiff, its officers and agents, and were purchased by innocent purchasers for value, who believed such representations and statements to be true, to the aggregate amount of \$1,378,500.00 par value, and these defendants are informed and believe that a large sum received by said Big Lost River Irrigation Company from the sale of said bonds, to wit: substantially \$700,000.00, was paid to the said plaintiff, and by plaintiff received and accepted for work

performed and material furnished under its said contract, authorized as aforesaid on the 21st day of August, 1909. That the said plaintiff at all times knew that said Big Lost River Irrigation Company had no other means of securing funds with which to pay for such work except by the sale of bonds as aforesaid, and that such bonds could not be sold except upon the representations and statements that the same were secured by first lien mortgage or deed of trust upon such irrigation works, and the rights and franchises of said Big Lost River Irrigation Company. And that the said plaintiff did not record or file for record in any public office for the registration of liens, contracts or mortgages, its said contract with the Big Lost River Irrigation Company, and the said plaintiff at all times knew that the purchasers of said bonds had no means of ascertaining or learning that the said plaintiff made or would make any claim of lien on said irrigation system which would be prior and superior to such mortgage, or otherwise; and the said plaintiff at all times knowing, as these defendants are informed and believe, that said bonds were being sold by the said Big Lost River Irrigation Company and purchased by innocent purchasers under the representations and circumstances herein stated, remained silent in regard to its claim of lien, and at no time [63] made any claim or statement showing or tending to show, or informed purchasers, or others, or the said trustees under said first mortgage and deed of trust, that it, the said plaintiff, claimed or would claim a lien on said irrigation works prior or superior to the

lien of such mortgage or deed of trust securing said bonds; and the said plaintiff, as these defendants are informed and believe, profited by such representations and statements, and received as hereinbefore stated, substantially \$700,000.00 of the proceeds from the sale of said bonds, and made no claim of lien until long after the said Big Lost River Irrigation Company had ceased selling said bonds, and until after the purchasers and holders thereof had purchased and paid for the same, and a large part of the proceeds thereof paid to the said plaintiff; and these defendants are further informed and believe, and so allege the fact to be, that much of the property upon which the said plaintiff claims a first and prior lien was acquired by said Big Lost River Irrigation Company, and paid for out of the moneys received by said Big Lost River Irrigation Company from the bondholders represented by these defendants in payment for the bonds of said company purchased and paid for under the representations and circumstances herein stated. That by reason of the premises the said plaintiff in justice, equity and good conscience should be decreed and held not entitled to a lien upon any of the property, rights or franchises of said Big Lost River Irrigation Company prior or superior to the lien of the mortgage or deed of trust securing said bonds; that the said plaintiff by its conduct and action in the premises is and should be estopped from claiming any lien on the property in said amended bill of complaint described, prior or superior to the lien of the mortgage or deed of trust securing the said bonds. [64]

20. Further answering, these defendants say that the irrigation system, dam, canals, works and structures described in plaintiff's amended bill of complaint, and in its said claim of lien, were constructed under section 4 of the Act of Congress approved August 18, 1894, commonly known as the Carey Act, and the acts amendatory thereof, and the laws enacted by the State of Idaho in pursuance of the powers granted by said Act of Congress and in furtherance of the objects thereof, and under and pursuant to a certain contract between the State of Idaho, and one George S. Speer, dated May 27, 1909, and the amendments thereto, which facts were known to plaintiff at the time it began construction under said contract. That said contract was duly assigned and transferred from said George S. Speer to the said Big Lost River Irrigation Company.

That the short particulars of said contract are as follows: The said irrigation works were to be constructed for the purpose of reclaiming said desert lands segregated under the said Act of Congress commonly known as the Carey Act, and when completed in accordance with the plans and specifications in said contract with the State of Idaho set forth or referred to, or to an extent sufficient to deliver water for irrigation purposes, the same were to be transferred to a corporation organized under the laws of the State of Idaho and known as the Lost River Water Company, which should thereafter have the management, ownership and control of said works and water rights, and each share of stock in said Lost River Water Company was to represent an

interest in said irrigation works, and a water right in such irrigation system sufficient for the irrigation of one acre of land, and all the stock of said Lost River Water Company, to wit: 100,000 shares of the par value of \$1.00 each, excepting the amount required for the [65] qualification of the directors, was to be issued to the said Big Lost River Irrigation Company, and by such company sold to owners of land and to persons filing on said Carey Act lands at a certain price or sum, payable ten per cent (10%) in cash at the time of purchase and the balance in nine annual installments; and each purchaser of a water right or interest in said irrigation system received and was to receive as evidence thereof one share of stock in said Lost River Water Company for each acre of land for which a water right was purchased. That the 100,000 shares of stock of said Lost River Water Company represented the estimated capacity of said irrigation system to the end that when water rights had been sold for the irrigation of all lands situated thereunder, all the stock of said Lost River Water Company would be held by the land owners, and the irrigation system owned by said Company. That the said Big Lost River Irrigation Company under said contract with the State of Idaho received only a franchise from said State to sell water rights in said irrigation system to the full capacity thereof upon the terms stated in said contract, and as security for the payment of the deferred payments due the Big Lost River Irrigation Company on the purchase price of water rights said Big Lost River Irrigation Com-

pany was given a lien and the right to contract for a lien on the lands for the irrigation of which water rights were sold in such system. And as collateral security for such deferred payments each purchaser of water rights was required to assign over to such Big Lost River Irrigation Company the certificate of stock in the Lost River Water Company purchased by him and evidencing such water right. That such certificates of stock and water rights were sold under a contract approved [66] by the State of Idaho, which contract provided that it should be a first and prior lien upon the lands therein described, and for which water rights were purchased. For a full and complete statement of the terms of the contract of May 27, 1909, between said Speer and the said State of Idaho, these defendants pray leave to refer to such contract when procured. And these defendants further pray leave to refer to the contract to be used by the Big Lost River Irrigation Company in the sale of water rights to owners of land or persons filing on such Carey Act lands when the same may be procured, for a full statement of the terms and conditions of such contract.

These defendants, upon their information and belief, allege the fact to be that the defendant, Big Lost River Irrigation Company, in accordance with the terms of said contract of May 27, 1909, with the State of Idaho, sold water rights in said irrigation system and shares of stock in said Lost River Water Company for approximately 62,201 acres at a total purchase price of substantially \$2,000,000.00, and that contracts for the sale of water rights ag-

gregating the principal sum of \$1,836,816. 27 in deferred payments have been deposited with the trustees under said first mortgage and deed of trust, as collateral security for the bonds, but no payments, as these defendants are informed and believe, can be collected under said contracts until such irrigation system has been substantially completed, or completed to an extent sufficient to deliver water to the purchasers of such water rights, as contemplated by the contracts under which said water rights and shares of stock were purchased. That the irrigation system described in plaintiff's amended bill of complaint has not been completed to an extent sufficient to deliver water, as these defendants are informed and believe, to any of said lands for the irrigation of which said Big Lost [67] River Irrigation Company has sold water rights in said system and shares of stock in said Lost River Water Company, or to any other lands. That the said contract of May 27, 1909, with the State of Idaho further provided that said irrigation system should be entirely completed on or before April 30, 1912; and these defendants are informed and believe that it will require \$500,000.00 or upwards to complete such irrigation system to an extent sufficient to deliver water to the lands for which water rights have been sold therein.

That by reason of the failure of the plaintiff to comply with the terms of its said contract with the Big Lost River Irrigation Company, and its failure to construct said works in accordance with the plans and specifications forming a part thereof, which plans and specifications had the approval of the

State Engineer of the State of Idaho and were the same plans and specifications included in the contract between said George S. Speer and the State of Idaho hereinbefore referred to, portions of the work already performed and structures partially completed have been condemned by the authorities of the State of Idaho, and the completion of said project prevented. That said irrigation system was designed as a single unit, and unless the same be wholly completed and in accordance with such plans and specifications, as set out in the contract referred to, the portions of said irrigation system already constructed are of little or no value and afford no security for the holders of said bonds so issued as hereinbefore stated, and the rights and property of said Big Lost River Irrigation Company in such project were and are subject to be forfeited to the State of Idaho. That by reason of the acts and conduct of the plaintiff in its failure to construct the works, so far as the same have already been constructed, in accordance with such plans and specifications, these answering defendants have been wholly deprived of the security and property upon which said bonds were based, and which were and are necessary [68] to give value to the same. That such departure by the plaintiff, as such contractor, from the contract plans and specifications for the construction of such works, was without authority and was and is in fraud of the rights of these defendants and destructive of the rights and property secured to these defendants under its said trust deed and mortgage.

That by reason of the premises and the facts herein alleged and set forth, the said plaintiff is not entitled under the laws of the State of Idaho or under the statutes of the United States hereinbefore referred to, to a lien upon such irrigation works, rights and franchises or upon the rights of said Big Lost River Irrigation Company under said contract with the State of Idaho, dated May 27, 1909, and the amendments thereof or on the said water contracts deposited with the said trustees as collateral security for said first mortgage bonds, or upon the shares of stock of said Lost River Water Company sold by said Big Lost River Irrigation Company to the purchasers of water rights and deposited with the trustees as additional security for the payment of said bonds.

21. Further answering, these defendants say that they are informed and believe and so allege the fact to be that the said plaintiff waived all claims to a mechanic's or other lien on the property, rights or franchises of said Big Lost River Irrigation Company, and accepted and received other securities from said Big Lost River Irrigation Company and others, and accepted the guarantees, promises and assurances of others, particularly the notes, promises, guarantees and assurances of Trowbridge & Niver Company, a corporation organized under the laws of the State of New Jersey and doing [69] business in the city of Chicago, State of Illinois, for the payment of the amounts due or to become due the said plaintiff from said Big Lost River Irrigation Company under its said alleged contract for the con-

struction of said irrigation works.

22. That said amendments are material and necessary to a proper defense of the case, and that the matters set up by way of amendment were not known to these defendants prior to the filing of the original answer.

WHEREFORE, these defendants pray that said amendments be allowed and be considered as a part of the answer on the hearing of the cause.

MAYER, MEYER, AUSTRIAN & PLATT,
Attorneys and Solicitors for Continental and Commercial Trust and Savings Bank, and Frank H. Jones, Trustee.

LACKNER, BUTZ & MILLER,
RICHARDS & HAGA,
Of Counsel. [70]

Let the within amendments be filed.

April 5, 1912.

DIETRICH,
Judge.

[Endorsed]: Filed April 5, 1912. [71]

[Title of Court and Cause.]

Order Allowing Certain Amendments to Answer.

The defendants, the Continental and Commercial Trust and Savings Bank, formerly named The American Trust and Savings Bank, and Frank H. Jones, trustees, having filed their request in writing for leave to amend the amended answer herein of said trustees by inserting immediately before the last paragraph of said answer the following:

“These defendants further show that they, these defendants, have requested to defendant, Big Lost River Irrigation Company to amend its answer herein by setting forth as fully as have these defendants the particulars wherein the complainant, Corey Bros. Construction Company, has failed to observe and comply with its contract with said irrigation company, and to offer testimony in support of such allegations to the same extent as have these defendants; but the said defendant Big Lost River Irrigation Company has refused the aforesaid request of these defendants. These defendants further show that said Big Lost River Irrigation Company has been insolvent since about the first of the year 1910, and, having before that time executed and delivered the trust deeds and bonds secured by the same, heretofore set forth in this answer, the said Big Lost River Irrigation Company from the time it so became insolvent had parted with all interest in the said irrigation system and project covered by said trust deeds, and a lien on which is sought to be established by complainant, and has since then had no interest therein; and that these defendants, representing said bondholders, are and have since said time been the successors in interest to said Big Lost River Irrigation Company; and that to permit the complainant to secure a lien prior to the lien of these defendants [72] would destroy the value of all of said bonds; that said Big Lost River Irrigation Company, defendant, has no funds with which to defend the suit of the complaint, nor any interest in so doing.

These defendants further show that at various times The Arnold Company, engineers, issued certificates for payment to the complainant for ninety per cent. (90%) of the work done. One Rosecrane was chief engineer in charge of the construction of said system, and said Rosecrane had no knowledge of the departures from the contract by Corey Bros. Construction Company, and the existence of such departures was wilfully concealed from said Rosecrane by the inspectors upon said work in the employ of said Arnold Company, under said Rosecrane."

The Court being fully advised in the premises doth hereby ORDER that said request be granted in part, to wit: That the said defendants be allowed to amend said amended answer by interlineation, and by inserting immediately before the last paragraph of said answer the following, to wit:

"These defendants further show that said Big Lost River Irrigation Company has been insolvent since about the first of the year 1910 and, having before that time executed and delivered the trust deeds and bonds secured by the same, heretofore set forth in this answer, the said Big Lost River Irrigation Company from the time it so became insolvent had parted with all interest in the said irrigation system and project covered by said trust deeds, and a lien on which is sought to be established by complainant, and has since then had no interest therein, and that these defendants, representing said bondholders, are and have since said time been the successors in interest to said Big

Lost River Irrigation Company; and that to permit the complainant to secure a lien prior to the lien of these defendants would destroy the value of all of said bonds; that said Big Lost River Irrigation Company, defendant, has no funds with which to defend the suit of the complainant, nor any interest in so doing.

These defendants further show that at various times The Arnold Company, engineers, issued certificates for payment to the complainant for ninety per cent (90%) of the work done. One Rosecrans was chief engineer in charge of the construction of said system, and said Rosecrans had no knowledge of the departures from the contract by Corey Bros. Construction Company, and the existence of such departures was wilfully concealed from said Rosecrans by the inspectors upon said work in the employ of said Arnold Company, under said Rosecrans."

And the additional amendment embraced in said request, and above set forth, is denied.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed Sept. 7, 1912. [73]

[Title of Court and Cause.]

**Bill of Complaint in Intervention of the Union
Portland Cement Company.**

To the Honorable Judges of the Circuit Court of the
United States in and for the District of Idaho,
in the Ninth Circuit, Sitting in Equity:

Union Portland Cement Company, a corporation,

by leave of Court first had and obtained, files this its bill of complaint in intervention in the above-entitled action.

Union Portland Cement Company, a corporation organized and existing [74] under and by virtue of the laws of the State of Utah, a citizen of the State of Utah, brings this its bill of complaint in intervention against the Corey Bros. Construction Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, a citizen of the State of Utah, and the Big Lost River Irrigation Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and a citizen of the State of Idaho, and The American Trust and Savings Bank, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and a citizen of the State of Illinois, Nephi Hansen and Ephriam Hansen copartners under the firm name and style of Hansen Bros., citizens of the State of Idaho, K. L. Molen and R. E. Kutler, copartners under the firm name and style of Molen & Kutler, citizens of the State of Idaho, J. W. Curd and N. Foss, copartners under the firm name and style of Curd & Foss, citizens of the State of Idaho, K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen, citizens of the State of Idaho, David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Bros., citizens of the State of Idaho, Frank H. Jones, a citizen of the State of Illinois, Frank Hess, a citizen of the State of Idaho, S. H. Walton, a citizen of the State

of Idaho, F. L. Pinney, a citizen of the State of Idaho, William Mooney, a citizen of the State of Idaho, and thereupon your orator complains and says:

Your orator shows unto this Court that on the 15th day of October, 1910, Corey Bros. Construction Company as a corporation in the above-entitled action, filed a bill of complaint in this court against the Big Lost River Irrigation Company, a corporation, et al., to foreclose a mechanic's lien against all the property of the Big Lost River Irrigation Company. That on or about the 29th day of May, 1911, in said action this Honorable Court appointed C. E. Clinton as receiver of all the property, both real and personal, of the Big Lost River Irrigation [75] Company, and that C. E. Clinton is now the duly appointed, qualified and acting receiver of all the property of said Big Lost River Irrigation Company.

Your orator further shows unto this Honorable Court that the above-entitled action, wherein Corey Bros. Construction Company, a corporation, is plaintiff, and the Big Lost River Irrigation Company, a corporation, et al., are defendants, is now at issue between the plaintiff and all of said defendants.

That on October 22d, 1910, your orator, as plaintiff, commenced an action in the above-entitled court against the Big Lost River Irrigation Company, a corporation, American Trust and Savings Bank, a corporation, and Frank H. Jones, as defendants, to foreclose a mechanic's lien, which mechanic's lien is hereinafter more fully described. That thereafter, on March 10th, 1911, the Big Lost River Irrigation

Company filed its answer in said action, and that on March 6th, 1911, the Continental and Commercial Trust and Savings Bank (formerly The American Trust and Savings Bank) and Frank H. Jones filed their answer in said action, and said action is now at issue between said plaintiff and said defendants, and said action is now pending in said court for final determination.

Your orator further shows unto this Honorable Court that there is no controversy existing between Corey Bros. Construction Company and your orator, and that said Corey Bros. Construction Company and your orator are seeking to establish their liens against the property of the Big Lost River Irrigation Company, and to have said liens to be declared a first lien upon all the property of said Big Lost River Irrigation Company, and that neither the Corey Bros. Construction Company or your orator is seeking to gain preference one over the other.

That your orator, Union Portland Cement Company, is now, and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Utah, and is now, [76] and was at all the times hereinafter set out, a resident and citizen of the State of Utah.

That the plaintiff, Corey Bros. Construction Company, is now and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Utah, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Utah.

That the defendant, Big Lost River Irrigation

Company is now and was at all the times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Idaho.

That the defendant, The American Trust and Savings Bank is now and was at all times hereinafter set out, a corporation organized and existing under and by virtue of the laws of the State of Illinois, and is now, and was at all the times hereinafter set out, a resident and citizen of the State of Illinois.

That the defendants Nephi Hansen and Ephriam Hansen are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Hansen Bros., and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants, K. L. Molen and R. E. Kutler, are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Molen & Kutler, and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants J. W. Curd and N. Foss are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Curd & Foss, and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants K. L. Molen and Jesse Molen are now and [77] were at all the times hereinafter set out, copartners doing business under the firm name and style of Molen & Molen, and are now, and

were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendants David Chamberlain and Thomas Chamberlain, are now and were at all the times hereinafter set out, copartners doing business under the firm name and style of Chamberlain Bros., and are now, and were at all the times hereinafter set out, residents and citizens of the State of Idaho.

That the defendant Frank H. Jones is now, and was at all the times hereinafter set out, a resident and citizen of the State of Illinois.

That the defendants Frank Hess, F. L. Pinney, S. H. Walton and William Mooney, are now and were at all the times hereinafter set out residents and citizens of the State of Idaho, within the meaning of the laws fixing and determining the jurisdiction of this Honorable Court.

Your orator further shows unto your Honorable Court that at all the times hereinafter mentioned your orator has transacted business and carried on operations as a contractor, in its corporate name and capacity, in the counties of Custer, Blaine, Bingham and Fremont, State of Idaho, and at all the times hereinafter set out had accepted the provisions of the Constitution, and had complied with the laws of the State of Idaho, relative to foreign corporations doing business within said State.

Your orator further shows unto this Honorable Court that on or about the 18th day of September, 1909, the defendant Big Lost River Irrigation Company entered into a written contract with your orator for the furnishing of cement to be used in the con-

struction of its canal system, which system is and was known as the "Big Lost River Irrigation System." That according to the terms of said contract your orator was to furnish to the defendant Big Lost River Irrigation Company all the [78] cement that said company should use during the years 1909 and 1910 upon its dam and ditch work, known as Big Lost River Land and Irrigation Company project, at the price of \$2.84 per barrel, in carload lots, F. O. B. Mackay and Moore, Idaho; sacks being extra. 1% discount off the net amount of cash in ten days; no discount allowed on sacks or freight. Said cement was to fulfill the specifications and requirements of the American Society of Civil Engineers, and the said Big Lost River Irrigation Company was to have the right to have cement tested at the factory before acceptance at Devil's Slide, Utah, if so desired. Said cement was to be packed in jute, cotton or canvas sacks, and charged to the purchaser at ten cents each. Upon all sacks returned, there was to be a discount of 10 cents a sack. Deliveries to be made at the rate of 2,000 to 4,000 barrels per month. That your orator was not to be held responsible for deliveries when prevented by strikes, lockouts, accidents, fires, floods, shortage of cars, or other causes over which it had no control. That if the said Big Lost River Irrigation Company failed to make payments when the same became due, or failed in any way to perform the conditions of said contract, your orator, at its option, had the right to cancel said contract.

Your orator further shows unto this Honorable Court that in pursuance of said contract, that it fur-

nished cement to the said defendant Big Lost River Irrigation Company, which according to the contract price amounted to the sum of \$37,406.88, and that it has been paid upon said amount by said Big Lost River Irrigation Company the sum of \$23,632.32, leaving a balance of \$13,774.56, which is now due to your orator from the said defendant Big Lost River Irrigation Company.

Your orator further shows unto this Honorable Court that the said defendant Big Lost River Irrigation Company had due notice of the furnishing of said cement, and that said cement was used in the construction of its said canal system, known as the Big Lost River Irrigation Company's system.

Your orator further shows unto this Honorable Court that the [79] last payment made by the said defendant Big Lost River Irrigation Company to it was on July 30th, 1910, and that said defendant Big Lost River Irrigation Company has failed, neglected and refused to make any further payments unto your orator, and that your orator has canceled said contract, as it had a right to do, and that there is now due to your orator the sum of \$13,774.56, together with interest thereon from the 25th day of June, 1910.

Your orator further shows unto this Honorable Court that on or about the 20th day of August, 1910, the same being less than 90 days after the last work done and materials furnished, your orator filed for record in the office of the County Recorder of Blaine, Bingham, Custer and Fremont Counties, Idaho (those being the counties where said work was done), a statement containing notice of intention to hold and

claim a lien, and a description of the property to be charged therewith, name of the owner or reputed owner, and name of the person by whom your orator was employed to do the work, with a statement of the terms and conditions of its contract, and an abstract of its indebtedness, showing the whole amount of the debt, and whole amount of credit, and the balance due or to become due to your orator, which statement was duly verified in accordance with law; that a copy of said statement or mechanic's lien is hereto attached to this bill, marked Exhibit "A," and is hereby referred to and is made a part of this bill of complaint, as though the same were fully set out in the body of this complaint.

Your orator further shows unto this Honorable Court, that said statement or mechanic's lien was filed with the County Recorder of Bingham County, State of Idaho, on the 25th day of August, 1910; in the County Recorder's office of Fremont County, State of Idaho, on the 23d day of August, 1910; in the County Recorder's office of Blaine County, State of Idaho, on the 20th day of August, 1910; in the County Recorder's office of Custer County, State of Idaho, on the 27th day of August, 1910.

Your orator further shows unto this Honorable Court, that the [80] property sought to be foreclosed under said mechanic's and contractor's lien so made and filed by your orator is as follows:

All the following lands in Custer County, State of Idaho: The Northeast Quarter of the Southeast Quarter (NE. $\frac{1}{4}$ SE. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the Southeast

Quarter of the Northeast Quarter (SE. $\frac{1}{4}$ NE. $\frac{1}{4}$) of Section Five (5), the Northwest Quarter of the Northwest Quarter (NW. $\frac{1}{4}$ NW. $\frac{1}{4}$) and the South Half of the Northwest Quarter (S. $\frac{1}{2}$ NW. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest Quarter (SW. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, head-gates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches and laterals, and, in general, the entire irrigation works, project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation System, and any addition or extension thereto, now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers, privileges and appurtenances connected therewith.

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at page 1507.

Permit No. 1513, to appropriate the waters of An-

telope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the [81] State Engineer of the State of Idaho, in Book 5 of Permits, at page 1513;

Permit No. 1748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 6 of Permits, at page 1748;

Permit No. 4061, being an amendment to Permit No. 1507 to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4061;

Permit No. 4062, being an amendment to Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4062.

Permit No. 4063, being an amendment to Permit 1748, to appropriate the waters of the Big Lost River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4063.

Permit No. 4946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4946.

Permit No. 4960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4960.

That certain right of way for the Big Lost River Reservoir, situated in Townships 7 and 8 North, Range 23 East, Boise Meridian, Custer [82] County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field-notes of the survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes showing the definite location of said reservoir, filed in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost

River Reservoir in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated [83] in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer, transferred and assigned to the company, for the construction of an ir-

rigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the counties of Custer, Blaine, Bingham and Fremont, in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above-mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act, constituting extensions or additions to its said present system.

All the contracts heretofore made by the company, or its predecessors in interest, or which may be hereafter entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigating system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the lands irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

Your orator further shows unto this Honorable Court that it has [84] fully kept and performed its part of said contract and agreement, and has furnished the material to the Big Lost River Irrigation Company, as required by said contract.

Your orator, upon information and belief, alleges

that under and by virtue of a certain deed of trust, dated July 1st, 1909, and recorded in the office of the County Recorder of Bingham County on the 3d day of September, 1909, and also recorded in Blaine County on the 3d day of September, 1909, and also recorded in Fremont County on the 4th day of September, 1909, and also recorded in the County Recorder's Office of Custer County on the 8th day of September, 1909, the defendants The American Trust and Savings Bank, a corporation, and Frank H. Jones, are, or attempted to be, made trustees for the defendant Big Lost River Irrigation Company, for the intent and purpose of granting to and authorizing The American Trust and Savings Bank and Frank H. Jones, as such trustees, authority to secure and obtain a loan, and to authorize the issuing of two million dollars' worth of bonds. That under and by virtue of said deed of trust the said defendant Big Lost River Irrigation Company, as your orator is informed and believes, and therefore alleges the fact to be, conveyed to The American Trust and Savings Bank and Frank H. Jones, as such trustee, all its right, title, claim and interest in and to said canal system, lands, rights of way and appurtenances, and being the property, or a portion of the property covered by your orator's said lien and hereinbefore described. Your orator further shows, upon information and belief, that said trust deed was not acknowledged until after the 26th day of August, 1909, and was not filed for record until after the 2d day of September, 1909.

Your orator, upon information and belief, alleges

that under and by virtue of a certain deed of trust, dated January 1st, 1910, the defendants The American Trust and Savings Bank, a corporation, and Frank H. Jones, are, or attempted to be, made trustees for the defendant Big Lost River Irrigation Company, for the intent and purpose of granting [85] to and authorizing the American Trust and Savings Bank and Frank H. Jones, as such trustees, authority to secure and obtain a loan, and to authorize the issuing of four hundred thousand dollars' worth of collateral trust bonds. That under and by virtue of said deed of trust the said defendant Big Lost River Irrigation Company, as your orator is informed and believes, and therefore alleges the fact to be, conveyed to The American Trust and Savings Bank and Frank H. Jones, as such trustee, all its right, title, claim and interest in and to said canal system, lands, rights of way and appurtenances, and being the property, or a portion of the property covered by your orator's said lien and hereinbefore described.

And your orator further shows unto this Honorable Court that whatever right, title, claim or interest may be created by said deeds of trust, or now had or held by The American Trust and Savings Bank and Frank H. Jones, as trustee, is subsequent, inferior and subject to the lien and claim of your orator herein.

Your orator further shows unto this Honorable Court that the defendants Nephi Hansen and Ephriam Hansen, copartners under the firm name and style of Hansen Bros., K. L. Molen and R. E. Kutler,

copartners under the firm name and style of Molen & Kutler, J. W. Curd and N. Foss, copartners under the firm name and style of Curd & Foss, K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen, David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Bros., Frank Hess, S. H. Walton, F. L. Pinney and William Mooney, have and claim to have some right, title or interest in and to the property hereinbefore described, by reason of certain mechanic's liens which said defendants have filed upon said property for work, labor and material furnished, as contractors and subcontractors, upon the system known as the Big Lost River Irrigation System or project.

Your orator further shows that said defendants are proper parties [86] to a full and complete determination of the issues involved in this action, as your orator is informed and believes, and so states the fact to be, that said liens and claims are true, but in what amounts the same are just, your orator at this time has not sufficient information to fully set forth in this bill of complaint, and that said defendants should be required to appear in this action, and if any claim they have, to set it forth, in order that all the claims of both plaintiff and defendants may be finally adjudicated in this action.

Your orator further alleges that said property as herein described is not separable, nor can the same be used, sold or realized upon in any other way than as an entirety.

Your orator further shows unto this Honorable

Court that it has been compelled to and has employed counsel, and that for the services of said counsel in preparing said lien herein and foreclosing the same, that the sum of \$1,500.00 is a reasonable attorney's fee to be allowed herein.

Your orator further shows unto this Honorable Court that the last material furnished was on the 25th day of June, 1910.

Your orator further shows unto this Honorable Court that while the written contract that was entered into between your orator and the defendant Big Lost River Irrigation Company was not signed until the 18th day of September, 1909, that your orator commenced furnishing said cement to said Big Lost River Irrigation Company on the 26th day of August, 1909, and that all of said cement that was furnished from the 26th day of August, 1909, up to and including the 18th day of September, 1909, was done at the special instance and request of the defendant Big Lost River Irrigation Company, and under and in pursuance to the terms of the contract which bears date of September 18th, 1909, and that said contract, while it was not signed until September 18th, 1909, the terms of said contract were in full force and effect on the 26th day of August, 1909.

[87]

Your orator further shows unto this Honorable Court that the system known as the Big Lost River Irrigation System is incomplete; that is to say, that the dam at Mackay is about half completed, and that about 90% of all the dams and ditches are completed.

Your orator further shows unto this Honorable

Court that the dam at Mackay, Idaho, is at this time in such a condition that more money should be spent upon it, in order to protect the work that has already been done.

Your orator further shows unto this Honorable Court that the Big Lost River Irrigation Company is insolvent, and unable to pay its debts, and that a receiver should be appointed for said corporation.

In consideration whereof, and inasmuch as your orator is remediless in the premises at and by the strict rules of the common law, and are only relievable in a court of equity, where matters of this kind are properly recognizable and relievable, your orator therefore prays the aid of this Honorable Court that the mechanic's lien hereinbefore set out may be decreed to be a lien upon all the property of the defendant Big Lost River Irrigation Company, as described in said lien within the jurisdiction of this Honorable Court. That the said defendant Big Lost River Irrigation Company may be decreed to pay unto your orator the amount due upon the contract as hereinbefore set out and as secured by said mechanic's lien, to wit, the sum of \$13,774.56, together with legal interest thereon from the 25th day of June, 1910, together with \$1,500.00 attorney's fee, and all costs and expenses incurred and expended, and in default thereof that the said Big Lost River Irrigation Company, and all persons claiming under it, or either of them, may be forever debarred and foreclosed from all equity of redemption and claim of, in and to the said premises, and every part and parcel thereof, and all and singular the premises as

covered by said mechanic's lien, with all the appurtenant property and effects, rights and franchises in said mechanic's lien mentioned, may be sold under a decree of this Honorable Court, and that out of the [88] money arising from the sale thereof, after deducting from the proceeds of such sale just allowance for all disbursements and expenses of the said sale, including attorney's and counsel fees, to apply said proceeds to the payment of the amount due to your orator upon said contract, and said mechanic's lien, together with interest and costs. And your orator further prays that a receiver may be appointed according to the practice of this Court, with the usual powers of receivers in like cases, of all property that is described in said mechanic's lien, and that the defendant Big Lost River Irrigation Company, and The American Trust and Savings Bank and Frank H. Jones, be decreed to make said transfer or conveyance to such receiver, and to the purchaser or purchasers of said property, at any sale as aforesaid as may be necessary and proper to put them, or either of them, in possession or control of said property. And your orator further prays that a decree of this Court be entered declaring whatever interest the defendants The American Trust and Savings Bank, a corporation, and Frank H. Jones, may have in and to said property to be inferior and subsequent to plaintiff's claim.

And may it please your Honor to grant unto your orator a subpoena of the United States of America, issued out of and under the seal of this Honorable Court, directed to the defendants Big Lost River

Irrigation Company, a corporation; The American Trust and Savings Bank, a corporation; Nephi Hansen and Ephriam Hansen, copartners under the firm name and style of Hansen Bros.; K. L. Molen and R. E. Kutler, copartners under the firm name and style of Molen & Kutler; J. W. Curd and N. Foss, copartners under the firm name and style of Curd & Foss; K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen; David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Bros.; Frank Hess, S. H. Walton, F. L. Pinney, William Mooney and Frank H. Jones, therein and thereby commanding them, on a day certain therein to be named, and under [89] a certain penalty, to be and appear before this Honorable Court, then and there to answer (but not under oath), all and singular the premises, and to stand, to perform and abide by the order, direction and decree as may be made against them in the premises as shall seem meet and agreeable to equity and good conscience, but in case any of said parties have appeared by counsel, then, and in that case, a copy of this bill of complaint in intervention can be served upon the attorneys of parties so appearing, and such parties shall have such time to answer or to plead to the same as is pre-

scribed by the rules of this Court.

And your orator will ever pray.

UNION PORTLAND CEMENT COM-
PANY,

By JAMES PINGREE,

Secretary.

H. H. HENDERSON,

Solicitor for Plaintiff. Postoffice Address,
Ogden, Utah, First National Bank
Building. [90]

[Exhibit "A" to Complaint in Intervention.]

State of Idaho,

Counties of Blaine, Bingham,

Custer and Fremont,—ss.

UNION PORTLAND CEMENT COMPANY,

Claimant,

vs.

BIG LOST RIVER IRRIGATION COMPANY,

Owner.

**NOTICE OF INTENTION TO HOLD AND
CLAIM A LIEN.**

TO WHOM IT MAY CONCERN:

NOTICE IS HEREBY GIVEN, That the Union Portland Cement Company is a corporation duly organized and existing under and by virtue of the laws of the State of Utah, with its principal place of business at Ogden, Weber County, Utah; and at all the times hereinafter mentioned, said company was and is doing business in its corporate name in Blaine, Bingham, Custer and Fremont Counties, State of Idaho; and at all times has accepted the provisions of the Constitution, and complied with the laws of

the State of Idaho, relative to foreign corporations doing business with said State.

That the Big Lost River Irrigation Company is a corporation organized and existing under and by virtue of the laws of the State of Idaho, and as such has been and now is doing business in its corporate name in said Blaine, Bingham, Custer and Fremont Counties, State of Idaho.

That the claimant Union Portland Cement Company holds and claims and hereby gives notice of lien for materials furnished, at the special instance and request of the said Big Lost River Irrigation Company, used in the construction of those certain canals and reservoirs, known as the Big Lost River Irrigation System.

That the said Big Lost River Irrigation Company is the [91] owner of said irrigation system, together with all the appurtenances thereunto belonging, or in anywise appertaining, and including laterals, dams, headgates, rights of way, lands, interest in lands, and rights hereinafter referred to and described more fully, and all situated in the Counties of Blaine, Bingham, Custer and Fremont, State of Idaho.

That the said Big Lost River Irrigation Company caused said reservoirs, canals, ditches, laterals, dams and headgates and works to be constructed.

That the Union Portland Cement Company, on or about the 18th day of September, 1909, entered into a contract with the Big Lost River Irrigation Company to furnish certain cement to said Big Lost River Irrigation Company, which contract is in words and figures as follows, to wit:

CONSTRUCTION CONTRACT.

THIS AGREEMENT, Made this 18th day of September, 1909, Witnesseth, That Union Portland Cement Company agrees to sell, and The Big Lost River Irrigation Company, Mackay, Idaho, agrees to buy and take delivery of during the year 1909-10 all the cement required for the construction of Dam and Ditch work known as the Big Lost River Land and Irrigation Company project, Mackay, Idaho, or twenty-five Thousand Barrels of Red Devil Cement (four sacks equalling a barrel), at the price of Two Dollars and Eighty-four cents, per barrel, in carload lots F. O. B. Mackay and Moore, Idaho, sacks extra. Delivery at central freight station, any charges for switching or demurrage at destination to be at expense of purchaser. Purchaser hereby agrees to take delivery at destination, subject to the rules and regulations of transportation company delivering same. Freight to be paid by purchaser and same to be credited to purchaser's account upon return to seller of receipted freight bill. This contract shall last during the year 1910 and shall expire with the 31st day of December of that year.

TERMS.—30 days; 1 per cent, off the net amount for cash in 10 days; no discount allowed on sacks or freight.

QUALITY.—Cement to be guaranteed to fulfill the specifications and requirements of the American Society of Civil Engineers. Seller's liability to cease when cement is delivered to the U. P. Co. at Devil's Slide, Utah. Purchaser to have the right to have cement tested at the factory before acceptance at

Devil's Slide, Utah, if desired.

SACKS.—Cement to be packed in jute, cotton or canvas sacks and charged to purchaser at 10 cents each. The seller to pay 10 cents each for empty Red Devil Cement sacks returned by the [92] purchaser to the seller in good condition. The seller's count and acceptance of sacks returned to be the basis of credit. Purchaser to pay the railroad freight on returned sacks.

DELIVERIES.—Deliveries are to be taken by the purchaser at the rate of 2000 to 4000 as advised barrels per month during 1909 and 10.

Seller shall not be held responsible for deliveries when prevented by strikes, lockouts, accidents, fires, floods, shortage of cars, or other causes over which seller has no control.

If purchaser fails to make any payment hereunder when the same becomes due, or fails in any way to perform the conditions of this contract, the seller may, at its option, cancel contract. Time is and shall be the essence of this agreement.

This contract shall not become operative or binding upon the Union Portland Cement Company until it has been approved by one of the Executive Officers of said Company at the home office in Ogden, Utah, and a copy with such approval forwarded to purchaser.

IN WITNESS WHEREOF, the seller and purchaser have hereunto set their hands and affixed their

vs. Corey Bros. Construction Company et al. 107
seals in duplicate the day and year first above written.

Seller:

UNION PORTLAND CEMENT COMPANY,

By JAMES PINGREE, Secretary.

Purchaser:

BIG LOST RIVER IRRIGATION CO.,

By C. B. HURTT, President.

That pursuant to the contract hereinbefore set out, the said Union Portland Cement Company did, on the dates hereinafter mentioned, furnish to the said Big Lost River Irrigation Company the following cement:

That the following is an itemized statement of all cement furnished and all credits which have been paid upon said statement:

1909.

Aug.	26	106	Bbls.....	\$	205.65
"	28	106	"		205.65
Sept.	5	125	"		408.75
"	14	125	"		242.50
"	16	125	"		242.50
"	16	150	"		490.50
"	18	230	"		752.10
"	23	225	"		735.75
"	28	225	"		767.25
Oct.	8	212	"		686.88
"	10	225	"		729.00
"	5	230	"		745.20
"	5	280	"		907.20
"	16	212	"		445.20

108 *Continental & Commercial etc. Bank et al.*

1909.

Oct.	17	135	Bbls.....	\$	283.50
“	20	160	“		518.40
“	22	160	“		518.40
“	24	212	“		686.88
“	30	185	“		599.40

[93]

Oct.	31	160	Bbls.....		518.40
Nov.	2	160	“		518.40
“	4	160	“		518.40
“	7	160	“		518.40
“	11	160	“		518.40
“	13	160	“		518.40
“	15	160	“		518.40
“	20	225	“		729.00
“	23	160	“		518.40
“	24	160	“		518.40
“	26	160	“		336.00
“	27	160	“		518.40
Dec.	17	225	“		472.50
“	18	212	“		445.20
“	23	160	“		518.40

1910.

Jan.	21	200	“		420.00
“	26	200	“		420.00
Feb.	3	Freight paid.....			228.00
“	10	170	Bbls.....		357.00
“	11	170	“		357.00
“	11	170	“		357.00
“	19	170	“		357.00
Mar.	28	200	“		648.00
“	31	125	“		262.50
Apr.	1	200	“		648.00

	"	2	125	"	.....	405.00
	"	3	125	"	.....	405.00
	"	5	125	"	.....	405.00
	"	5	125	"	.....	405.00
	"	5	200	"	.....	648.00
	"	6	125	"	.....	405.00
	"	7	125	"	.....	405.00
	"	7	125	"	.....	369.37
	"	10	125	"	.....	405.00
	"	13	150	"	.....	315.00
	"	20	200	"	.....	420.00
	"	25	180	"	.....	378.00
	"	26	150	"	.....	486.00
	"	26	150	"	.....	486.00
	"	26	180	"	.....	378.00
	"	26	140	"	.....	294.00
May		3	200	"	.....	648.00
Apr.		22	200	"	.....	420.00
May		4	180	"	.....	583.20
	"	5	150	"	.....	486.00
	"	10	180	"	.....	583.20
	"	10	200	"	.....	648.00
	"	11	200	"	.....	648.00
June		2	200	"	.....	648.00
	"	2	200	"	.....	648.00
	"	4	125	"	.....	262.50
	"	7	Freight prepaid on car 83017..			205.20
	"	12	150	Bbls.....		315.00
	"	14	200	"	.....	420.00
	"	16	170	"	.....	550.00
	"	18	200	"	.....	420.00

110 *Continental & Commercial etc. Bank et al.*

1910.

June 20	180	"	.....	\$ 378.00
" 22	170	"	.....	550.80
" 25	225	"	.....	472.50

\$37,406.88

[94]

CREDITS.

1909.

Oct. 2	Cash.....	\$ 411.30
" 15	"	3,639.35
" 20	Freight paid.....	517.65
" 29	"	619.12
" 29	"	508.92
" 29	"	25.65
" 29	"	40.28
" 15	Cash.....	4,926.84
" 15	Overcharge....	74.01
Nov. 22	Cement sacks returned.....	92.02
" 24	"	173.80
Dec. 15	Cash....	5,390.77
" 16	Cement sacks returned.....	257.84
" 16	"	417.23

1910.

Jan. 11	"	102.81
" 11	"	106.20
" 15	Cash.....	658.22
" 27	Cement sacks returned.....	65.63
Feb. 18	Cash.....	668.17
" 7	Diversion charge.....	2.00
" 7	Under charge.....	8.74
" 7	"	10.64
" 28	Cement sacks returned.....	129.05

Mar. 15	Cash.....	1,505.57
" 9	Cement sacks returned and refund from R. R.....	13.24
Apr. 16	Cash...	634.76
May 12	Cement sacks returned.....	263.62
" 15	Freight.....	106.87
" 26	Cement sacks returned.....	375.86
" 26	" " "	171.90
June 18	" " "	83.86
" 18	" " "	216.10
" 18	" " "	367.02
" 23	" " "	276.40
July 20	" " "	128.90
" 20	" " "	59.00
" 30	" " "	279.02
" 30	" " "	303.96
		<hr/> \$23,632.32

Balance due \$13,774.56.

That the first material was furnished by said Union Portland Cement Company on or about August 26th, 1909, and that the last material was furnished on the 25th day of June, 1910.

That all of said material was used by the said Big Lost River Irrigation Company in constructing that certain irrigation system known as Big Lost River Irrigation System, in Blaine, Bingham, Custer and Fremont Counties, State of Idaho. [95]

That there is now due and owing to the Union Portland Cement Company, claimant, from the Big Lost River Irrigation Company, owner, the sum of \$13,774.56, after deducting all just credits and off-

sets, and that a lien is claimed for said amount upon all the ditches, dams, laterals, irrigation system works, water rights, rights of way, masonry work, reservoirs, iron and wood structures, headgates, lands, interest in lands, and rights and property of every nature and appurtenant thereto of the Big Lost River Irrigation System, and which property is more specifically described as follows:

All of the following lands in Custer County, State of Idaho: The Northeast quarter of the Southeast quarter (NE. $\frac{1}{4}$ SE. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the Southeast quarter of the Northeast quarter (SE. $\frac{1}{4}$ NE. $\frac{1}{4}$) of Section Five (5), the Northwest quarter of the Northwest quarter (NW. $\frac{1}{4}$ NW. $\frac{1}{4}$) and the South half of the Northwest quarter (S. $\frac{1}{2}$ NW. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range 23 East; the Southwest quarter (SW. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less.

All the reservoirs, dams, canals, ditches, laterals, headgates, coulees, draws, flumes, rights of way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches and laterals, and, in general, the entire irrigation works, project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, commonly known as the Big Lost River Irrigation system, and any addition or extension thereto, now constructed by the company, or which it may hereafter construct or acquire, together with all franchises and powers,

privileges and appurtenances connected therewith.

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1,507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of [96] one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1,507;

Permit No. 1,513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 5 of Permits, at page 1,513;

Permit No. 1,748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 6 of Permits, at page 1,748.

Permit No. 4,061, being an amendment to Permit No. 1,507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4,061.

Permit No. 4,062, being an amendment of Permit No. 1,513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book

11 of Permits, at page 4,062.

Permit No. 4,063, being an amendment to Permit No. 1,748, to appropriate the waters of the Big Lost River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4,063.

Permit No. 4,946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4,946. [97]

Permit No. 4,960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4,960.

That certain right of way for the Big Lost River Reservoir, situated in Township 7 and 8 North, Range 23 East, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field notes of the survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field notes showing the definite location of said reservoir, filed

in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field notes thereof, filed in the United States Land Office, at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost River Reservoir, in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, [98] situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which right of way reference is hereby made to the map and field notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the

United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field notes thereof filed in said land office on said day.

All the rights, grants, interests, privileges, easements and franchises acquired by the company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer transferred and assigned to the Company for the construction of an irrigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the Counties of Custer, Blaine, Bingham and Fremont in the State of Idaho; as well as under any similar contract that may be made between the State of Idaho and the company, and any amendment to the above mentioned present contract, for the construction of irrigation works and systems in Idaho under the Carey Act, constituting extensions or additions to its said present system.

All the contracts heretofore made by the company, or its predecessors in interest, or which may be hereafter entered into by the company with settlers for the sale of water rights for water to be taken from or through said irrigation system, as the same is now or may be hereafter constituted, and all mortgages, constituting, to the extent of the unpaid portion of the purchase price of such [99] water rights, first

liens on the lands irrigated thereunder.

All right, title and interest in and to said Idaho State Desert Land List No. 31, and the proposition made by said George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners for the irrigation of the lands mentioned in said list.

WHEREFORE, the Union Portland Cement Company, a corporation, claimant, hereby claims and gives notice that it holds and claims a lien upon all the property hereinbefore described, and upon the whole thereof, for the sum of \$13,774.56, together with legal rate of interest thereon from the 25th day of June, 1910, under and by virtue of the provisions of the Statutes of Idaho relating to liens and preferred claims of mechanics and others in such cases made and provided.

Dated this 9th day of August, 1910.

UNION PORTLAND CEMENT COMPANY,

By JAMES PINGREE,

Secretary.

Attest: [Seal] JAMES PINGREE,

Secretary.

State of Utah,

County of Weber,—ss.

James Pingree, being first duly sworn, on oath says: That he is Secretary of the Union Portland Cement Company, a corporation, claimant in the foregoing notice of lien, and as such is authorized to make and verify this lien; that he has read the above and foregoing claim and notice of lien, and knows the contents thereof, and the same is true and just, and the statements therein contained of the

demand of the claim of said Union Portland Cement Company against the Big Lost River Irrigation Company for material furnished upon and in the construction of said canal system are correct, and that said materials were furnished as [100] therein stated, and that there is now due and owing said Union Portland Cement Company from the Big Lost River Irrigation Company after deducting all just credits and off-sets, the sum of \$13,774.56.

JAMES PINGREE.

Subscribed and sworn to before me this 9th day of August, 1910.

[Seal]

E. F. BRATZ,
Notary Public.

My commission expires August 8, 1913.

[Endorsed]: Filed Jan. 4, 1912. A. L. Richardson, Clerk. [101]

[Title of Court and Cause.]

[**Answer of Continental and Commercial Trust and Savings Bank and Frank H. Jones to Bill of Complaint in Intervention.**]

THE JOINT AND SEVERAL ANSWER OF
THE CONTINENTAL AND COMMERCIAL
TRUST AND SAVINGS BANK (FORM-
ERLY NAMED THE AMERICAN TRUST
AND SAVINGS BANK), A CORPORATION,
AND FRANK H. JONES, DEFENDANTS,
TO THE INTERVENING BILL OF COM-
PLAINT OF THE UNION PORTLAND
CEMENT COMPANY.

Now come Continental and Commercial Trust and Savings Bank (formerly named The American Trust and Savings Bank) and Frank H. Jones, and jointly and severally reserving unto themselves all manner and benefit of exception to the numerous errors, uncertainties and insufficiencies in the said intervening bill of complaint aforesaid, with like effect as if these defendants had severally demurred thereto, for answer to the said intervening bill of complaint, or to such parts thereof as these defendants are advised it is necessary or material for them to make answer unto, answering say: [102]

1. These defendants are not advised, save by the allegations of the said intervening bill of complaint, whether or not the intervening complainant is a corporation organized under the laws of the State of Utah, or whether it is a resident or citizen of the State of Utah, and pray that the said intervening complainant may be required to make strict proof of its allegations in that behalf, but these defendants admit that the defendant, Continental and Commercial Trust and Savings Bank, under its former name of The American Trust and Savings Bank, was, at the time of the filing of the intervening bill of complaint herein and still is a citizen and resident of the State of Illinois, and that the defendant, Frank H. Jones, is also a citizen and resident of the State of Illinois, but these defendants are not advised, save by the allegations of the said intervening bill of complaint, as to the residence and citizenship of the other defendants to the said intervening bill of complaint, and pray that the said intervening complainant may

be required to make strict proof of its allegations in that behalf.

2. Further answering these defendants admit that on or about the 15th day of October, 1910, Corey Bros. Construction Company filed a bill of complaint in this court against the Big Lost River Irrigation Company, and that on or about May 29, 1911, this Court appointed C. E. Clinton as receiver of the property of the Big Lost River Irrigation Company, and that [103] C. E. Clinton is now the receiver of the property of the said Big Lost River Irrigation Company; but these defendants are not advised, save by the allegations of said intervening bill of complaint, as to whether or not said action instituted by said Corey Bros. Construction Company is now at issue between the said complainant and all of the defendants thereto, and pray that the said intervening complainant may be required to make strict proof of its allegations in that behalf.

3. Further answering these defendants admit that on or about October 22, 1910, the intervening complainant commenced an action in this court against the Big Lost River Irrigation Company, and these defendants, to foreclose a certain alleged mechanic's lien, and that thereafter these defendants filed their answers to the bill of complaint in said cause, but these defendants are not advised, save by the allegations of said bill of complaint, as to whether an answer in said cause has been filed by the Big Lost River Irrigation Company, or as to whether said action is now at issue between the complainant therein and all of the defendants, and pray that the

said complainant may be required to make strict proof of its allegations in that behalf.

4. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to whether there is no controversy between Corey Bros. Construction Company and the intervening complainant [104] or as to whether Corey Bros. Construction Company or the intervening complainant is seeking to gain a preference one over the other, and pray that the said intervening complainant may be required to make strict proof of its allegations in that behalf.

5. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to whether or not said intervening complainant has complied with the provisions of the constitution and laws of Idaho relative to foreign corporations, nor are these defendants advised as to whether or not intervening complainant was, at the time of the filing of the bill of complaint, or at the time of the furnishing of the material alleged in said bill of complaint, authorized to carry on business or maintain suits in the State of Idaho, or in the said courts, and these defendants pray that the said intervening complainant may be required to make strict proof in that regard; nor are these defendants advised as to whether or not, at the times mentioned in said intervening bill of complaint, said intervening complainant transacted business or carried on operations as a contractor in its corporate name, and capacity, in the counties of Custer, Blaine, Bingham and Fremont, in the State of

Idaho, and pray that the said intervening complainant may be required to make strict proof of its allegations in that regard. [105]

6. Further answering, these defendants say that they are not informed, save by the allegations of said intervening bill of complaint, as to whether or not the defendant, Big Lost River Irrigation Company, entered into any contract with the said intervening complainant upon the 18th day of September, 1909, or at any other time, nor are these defendants advised as to the terms of said alleged contract, nor whether any such supposed contract purporting to be the contract of the Big Lost River Irrigation Company was, in fact, the valid and properly executed and binding contract of said Big Lost River Irrigation Company, nor as to the terms of payment, or as to the price to be paid for the material alleged to be furnished under any such contract; and these defendants pray that the said intervening complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf, as against these defendants.

7. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to what cement, if any, has been furnished by the intervening complainant, nor as to the price or value of said cement, nor as to whether or not any such cement alleged to have been furnished was used in the construction of the canal system known as the Big Lost River Irrigation Company's system, nor as to whether or not the said cement was of a character and quality cor-

responding to the terms of said alleged [106] contract, nor as to whether or not the use of the said cement in fact added anything to the value of the said property of the Big Lost River Irrigation Company in said intervening bill of complaint described, nor as to what payments have been made on account of said alleged furnishing of cement, nor as to whether the defendant, Big Lost River Irrigation Company, has refused to make further payments to the intervening complainant, or as to whether the intervening complainant has canceled the said contract, or as to the amounts claimed to be due to the intervening complainant on said alleged contract, and these defendants pray that said intervening complainant may be required to make strict proof of each of the allegations of its intervening bill of complaint in that behalf, as against these defendants.

8. Further answering, these defendants say that they are advised and believe, and therefore allege the fact to be, that any contract in writing entered into between the intervening complainant and said Big Lost River Irrigation Company was valid and binding only from the date of its execution and delivery.

9. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to whether or not said intervening complainant has filed for record any notices whatsoever in any county in the State of Idaho, or as to what are the contents [107] of any purported notices claimed to have been so filed in any county in said State, nor are these defendants advised, save by the allegations of said intervening

bill of complaint, as to whether or not any purported copy of any notice attached to the said intervening bill of complaint, is a true copy of any notice actually filed in any county in said State, and these defendants pray that the intervening complainant may be required to make strict proof of the allegations of its bill of complaint in that regard.

10. Further answering, these defendants say that they are not advised, save by the allegations of said intervening bill of complaint, as to whether or not the intervening complainant fulfilled and performed its part of said alleged contract and agreement with said Big Lost River Irrigation Company, or as to whether it furnished the material to the said Big Lost River Irrigation Company required in and by said alleged contract, and these defendants pray that the intervening complainant may be required to make strict proof of the allegations of its intervening bill of complaint in that regard.

11. Further answering, these defendants admit that the said Big Lost River Irrigation Company, by virtue of its certain deed of trust dated January 1, 1909, and recorded in the various counties in the State of Idaho as set forth in said intervening bill of complaint, did convey to these defendants, as trustees, all and singular the property described in the [108] said intervening bill of complaint alleged to be the property sought to be foreclosed under and by virtue of the mechanic's lien claimed by said intervening complainant in said intervening bill of complaint, and these defendants say they are advised and believe, and therefore charge the fact to be, and

claim the said lien created by said deed of trust was not subsequent, inferior, or subject to any lien or claim of the intervening complainant in said intervening bill of complaint, but, on the contrary thereof, these defendants allege that the lien created by the said deed of trust was prior and paramount to any claim of the intervening complainant herein, and remains and still is a valid first lien upon the property in the trust deed described, and these defendants beg leave to refer to the original of said mortgage, or deed of trust, and the record thereof as the same is spread of record in the Recorder's office of the various counties, with like effect as if these defendants had set forth the said deed of trust and each of the provisions thereof, according to its and their legal effect, in this answer.

12. These defendants further show that in and by said trust deed it was, among other things, provided, in addition to the said conveyance of the said property hereinbefore referred to, that the Big Lost River Irrigation Company should assign to and deposit with these defendants, as trustees, as additional security for the payment of bonds of the said [109] Big Lost River Irrigation Company of the par value of Two Million (\$2,000,000.) Dollars, the said deed of trust authorized to be issued, all contracts for the purchase of water rights for the irrigation of portions of the land described in Idaho State Desert Land Lists numbered 8, 18 and 31, which contracts were and are known as settlers' contracts, and these defendants aver that, in fact, there having been issued and certified by these defendants, and are

now outstanding, bonds of the par value of One Million Three Hundred and Seventy-eight Thousand Five Hundred (\$1,378,500.) Dollars, secured by said mortgage, or deed of trust, all of which, together with interest due and accrued thereon, now remain wholly outstanding and unpaid, and these defendants state that there have been duly assigned and deposited with these defendants as trustees, all of the said settlers' contracts, as these defendants are informed and believe and therefore allege, which have been issued or executed by said Big Lost River Irrigation Company, and these defendants are informed and believe, and therefore state the fact to be, that the said deed of trust, or mortgage, and the said bonds, are a valid and subsisting first lien not only upon the property in said deed of trust *and* hereinbefore described, but upon the said settlers' contracts and each thereof, and that the lien of said mortgage, or deed of trust, and of the said bonds secured thereby, is, as these defendants are informed and believe, and therefore allege the fact to be, prior to any claim or demand on the part of the said intervening complainant [110] herein; and these defendants upon information and belief deny that the claim of these defendants, as trustees, and the interest created by the said deed of trust, is in any way subsequent, inferior or subject to the lien and claim of the intervening complainant herein.

13. Further answering, these defendants admit and say that afterwards, and on or about the first day of January, A. D. 1910, said Big Lost River Irrigation Company duly executed, acknowledged and

delivered to these defendants (defendant Continental and Commercial Trust and Savings Bank being then named and called The American Trust and Savings Bank), its certain mortgage or deed of trust denominated "A Collateral Trust Mortgage to Secure its Collateral Trust Bonds for the Aggregate Sum of \$400,000.00, with interest evidenced by coupons thereto attached, at the rate of 6% per annum," which said collateral trust mortgage was duly recorded in the recorder's office of the county of Blaine, in the State of Idaho, on the 28th day of March, 1910, and duly recorded in the Recorder's office of the county of Bingham in said State on the 28th day of March, 1910, and duly recorded in the Recorder's office of the County of Custer in said State on the first day of April, 1910, and duly recorded in the Recorder's office of the County of Fremont in said State on the 8th day of April, 1910, in and by which said collateral trust mortgage, the said Big Lost River Irrigation Company transferred and conveyed to these defendants all [111] and singular the same property theretofore transferred and conveyed to these defendants under said deed of trust hereinbefore referred to, but in said collateral trust mortgage it was specially provided and set forth that the conveyance therein made and the security thereby given for the said \$400,000.00 of collateral trust bonds was and should be subject to the prior accruing indebtedness of the said deed of trust dated July 1, 1909, hereinbefore described; and these defendants say that subject to the security and lien of the said deed of trust dated July 1, 1909, as hereinbefore described, the

said Big Lost River Irrigation Company by its said collateral trust mortgage conveyed all and singular the said property upon substantially the same terms and conditions as in said deed of trust of July 1, 1909, as hereinbefore set forth and contained, and these defendants say that under said collateral trust mortgage there were issued and are now outstanding collateral trust bonds of the par value of Two Hundred Thousand (\$200,000.00) Dollars, together with coupons now overdue and unpaid thereon, evidencing the interest thereon, which said collateral trust mortgage and the bonds secured thereby are, as these defendants are informed and believe and therefore allege the fact to be, a lien upon all the property in said mortgage described, and upon said settlers' contracts, subsequent only to the lien of the said deed of trust of July 1, 1909, and are prior to any claim or demand on the part of the said intervening complainant herein; [112] and these defendants on information and belief deny that the claim of these defendants, as trustees under said collateral trust mortgage, and the interest created by said collateral trust mortgage, is in any way subsequent, inferior or subject to the alleged lien and claim of the intervening complainant herein.

14. Further answering, these defendants say they are not advised, save by the allegations of said intervening bill of complaint, as to any claims of any of the other defendants to said intervening bill of complaint by reason of certain mechanic's liens claimed to be filed by certain other defendants, and these defendants pray that the said intervening complainant

may be required to make strict proof of the allegations of its intervening bill of complaint in that regard, and these defendants say that they are informed and believe, and therefore allege the fact to be, that the lien of said mortgages and deeds of trust to these defendants hereinbefore described, are prior, superior and paramount to any claim or demand on the part of any other defendants alleged to have filed mechanic's liens upon the property of the Big Lost River Irrigation Company.

15. Further answering, these defendants say they are not advised, save by the allegations of the said intervening bill of complaint, as to whether or not any of the defendants thereto alleged to have mechanic's liens are proper parties to a full and complete determination of the issues involved herein, and [113] pray that the intervening complainant may be required to make strict proof of the allegations of its intervening bill of complaint in that regard, as against these defendants.

16. Further answering, these defendants say they are not advised, save by the allegations of said intervening bill of complaint, as to whether or not the property described in said intervening bill of complaint is separable or can be used, sold or realized upon in any other way than as an entirety, and in so far as the intervening complainant may be advised that such allegations are necessary or material, these defendants pray that the intervening complainant may be required to make strict proof thereof.

17. Further answering, these defendants say that they are not informed, save by the allegations of said

intervening bill of complaint, as to what, if any, attorneys' fees were incurred by the said intervening complainant, nor as to what would be a reasonable and proper fee for the said intervening complainant's attorneys; wherefore, these defendants neither admit nor deny the allegations of the said intervening bill of complaint in that respect, but these defendants deny that any such attorneys' fee is a lien upon the premises described in the intervening bill of complaint as against the lien of the said bonds and deed of trust and collateral trust mortgage hereinbefore described. [114]

18. Further answering, these defendants say that they are not advised, save by the allegations of the said intervening bill of complaint, as to when the last material was furnished by said intervening complainant, and pray that the intervening complainant may be required to make strict proof of the allegations of its intervening bill of complaint in that regard.

19. Further answering, these defendants say they are not advised, save by the allegations of the said intervening bill of complaint, as to the date of the signing of any alleged contract between said intervening complainant and the Big Lost River Irrigation Company, nor as to when said intervening complainant commenced furnishing cement to said Big Lost River Irrigation Company, nor as to the period of time during which any cement was furnished by said intervening complainant, or whether it was furnished at the special instance and request of the defendant, Big Lost River Irrigation Company, and these defendants pray that the interven-

ing complainant may be required to make strict proof of each and all of the allegations in its intervening bill of complaint in that regard, and these defendants, further answering, say that they are not advised, save by the allegations of the said intervening bill of complaint, as to the date of any such alleged contract between the intervening complainant and Big Lost River Irrigation Company, nor as to the date of signing any such alleged contract, and these defendants pray that the said intervening complainant may be [115] required to make strict proof of the allegations in said intervening bill of complaint in that regard; and further answering, these defendants deny that any alleged contract between said intervening complainant and said Big Lost River Irrigation Company was in full force and effect on August 26, 1909, and these defendants say that any contract in writing entered into between the complainant and the said Big Lost River Irrigation Company was valid and binding only from the date of its execution and delivery.

20. Further answering, these defendants say they are not informed, save by the allegations of said intervening bill of complaint, as to the condition of the Big Lost River Irrigation Company's system, or as to the condition of the dam at Mackay therein described, or as to the percentage of completion of all of the dams and ditches comprised in the Big Lost River Irrigation Company's system, or as to whether any additional work is required to be done, or as to whether any additional money should be spent in order to protect the work already done upon said Big

Lost River Irrigation Company's system; or as to whether or not the said Big Lost River Irrigation Company is insolvent; and these defendants neither admit nor deny the allegations of the intervening bill of complaint in that regard, but pray that the intervening complainant may be required to make strict proof of each of its allegations in that regard. [116]

21. Further answering, these defendants say that they are informed and believe, and therefore allege the fact to be, that under the laws of the State of Idaho, and under the laws of the United States of America, the said intervening complainant is not entitled to any mechanic's lien upon the said property in the said intervening bill of complaint described, or against the said settlers' contracts hereinbefore referred to, or as against the bonds and mortgage and collateral trust mortgage hereinbefore described, and these defendants claim the same advantage of this claim of defense as if these defendants had demurred to the said intervening bill of complaint upon that ground.

22. Further answering, these defendants say that they are informed and believe, and therefore state the fact to be, that the proceeds of the said bonds so issued and outstanding, and secured by the said deeds of trust and by the assignment of the said settlers' contracts, were used in and about the work of constructing said irrigation works and dams, and that large amounts of the proceeds of said bonds have been paid to the intervening complainant herein, and that as to so much of the proceeds of said bonds as has been applied to the payment of the cost of con-

struction of said dams and irrigation works, and as to so much of the proceeds of said bonds as has been applied to the payment of the said intervening complainant for work done by it upon said irrigation works and dams, these defendants, as trustees for said bondholders, are entitled in equity [117] and good conscience to a lien upon all the said property, at least co-ordinate with any lien claimed by the said intervening complainant, apart from the rights arising from the execution and recording of said deeds of trust, and arising from the assignment and deposit of the settlers' contracts aforesaid.

23. Further answering, these defendants say that under and by virtue of the terms of the said deed of trust and collateral trust mortgage, these defendants, upon any default on the part of the said Big Lost River Irrigation Company, are entitled to the possession and control of all the property in said deed of trust and collateral trust mortgage described, and these defendants allege that under the said provisions of said deed of trust and collateral trust mortgage, these defendants are entitled to the possession and control of all the property in said intervening bill of complaint described, as against the said intervening complainant herein, or as against any person appointed as receiver under the said intervening bill of complaint, or under the bill of complaint of the Corey Bros. Construction Company herein; and these defendants claim that as trustees under said deed of trust and collateral trust mortgage they are entitled to any moneys received by any receiver appointed by this Court under the bill of complaint of

the Corey Bros. Construction Company, or under the intervening bill of complaint herein, and that these defendants are entitled to a first and prior lien upon any assets coming into the hands of any such [118] receiver, and these defendants pray that their rights in these regards may be protected in any order which may be entered herein, pending the further hearing of this suit, upon the prayer of the bill of complaint or the intervening bill of complaint herein, for the appointment of a receiver, or otherwise.

24. As to each of the allegations of the said intervening bill of complaint herein not in this answer either expressly admitted or denied, these defendants pray that the intervening complaint may be required to make strict proof of each of said allegations of said intervening bill of complaint, as against these defendants.

25. Further answering, these defendants deny that the intervening complainant is entitled to any of the relief prayed for in the said intervening bill of complaint.

WHEREFORE, having fully answered the intervening bill of complaint herein, these defendants pray to be hence dismissed with their costs and charges in this behalf most wrongfully sustained.

CONTINENTAL AND COMMERCIAL
TRUST AND SAVINGS BANK (Formerly named THE AMERICAN TRUST AND SAVINGS BANK), and FRANK H. JONES, Defendants,

By MAYER, MEYER, AUSTRIAN &
PLATT, and N. M. RUICK,

Their Solicitors.

MAYER, MEYER, AUSTRIAN & PLATT,
Chicago, Illinois,

N. M. RUICK,
Boise, Idaho,

Solicitors and of Counsel for Continental and Commercial Trust and Savings Bank (formerly named The American Trust and Savings Bank) and Frank H. Jones, Defendants.

[Endorsed]: Filed Feb. 3, 1912. [119]

[Title of Court and Cause.]

Answer of the Big Lost River Irrigation Company to the Complaint in Intervention of the Union Portland Cement Company.

I.

Comes now the Big Lost River Irrigation Company, a corporation, and saving and reserving to itself all manner of benefit and advantage of exception to the numerous errors, uncertainties and insufficiencies in the said bill of complaint of the Union Portland Cement Company contained, with like effect as if this defendant had demurred thereto, for answer to the said bill of complaint, or to such parts thereof as this defendant is advised it is necessary or material for it to make answer unto, answering says:

II.

1. This defendant is not advised, save by the allegations of the said bill of complaint, whether or not the plaintiff is a corporation organized under the laws of the State of Utah, or whether it is a resident

or citizen of the State of Utah, and prays that the said plaintiff may be required to make strict proof of its allegations in that behalf. [120]

2. Further answering, this defendant says that it is not advised, save by the allegations of said bill, as to whether the plaintiff in said bill has complied with the provisions of the Constitution and laws of the State of Idaho relative to foreign corporations, nor is this defendant advised as to whether or not the plaintiff was, at the time of the filing of the bill of complaint, or at the time of the furnishing of the alleged material in said bill of complaint described, authorized to carry on business or maintain suits within the State of Idaho, or in this court, and the defendant prays that the plaintiff may be required to make strict proof of its allegations in that regard.

3. Further answering, this defendant says that it is not advised, save by the allegations of said bill of complaint, as to what cement, if any, has been furnished by the plaintiff, nor as to the price or value of such cement, nor as to whether such cement alleged to have been furnished and used in the construction of the, or any, canal system of this defendant, nor as to whether the said cement was of a character or quality corresponding to the terms of said contract.

4. Further answering, this defendant says that it is advised and believes and therefore alleges the fact to be that any contract in writing entered into between the plaintiff and the defendant was valid and binding only from the date of its execution and delivery.

5. Further answering, this defendant denies that

plaintiff has furnished cement under the contract referred to in the bill of complaint to this defendant of the value of, or which, according to contract price amounted to the sum of Thirty-seven Thousand Four Hundred Six Dollars Eighty-eight Cents (\$37,406.-88), and denies that the sum of Thirteen Thousand Seven Hundred Seventy-four Dollars Fifty-six Cents (\$13,774.56), together with interest thereon, is now due by this defendant to plaintiff on account of cement so alleged to have been furnished. [121]

6. Further answering, this defendant says that it is not advised, save by the allegations of the said bill of complaint, as to whether or not the said plaintiff has filed for record any notices whatsoever of intention to claim a lien in any county in the State of Idaho, or as to what are the contents of any purported notices of lien claimed to have been so filed, nor is this defendant advised, save by the allegations of said Bill, as to whether or not the, or any, purported copy of said, or any, notice, attached to the said bill of complaint, is in fact a true copy of any notice actually filed, as alleged in said bill of complaint, and this defendant prays that the plaintiff may be required to make strict proof of the allegations of its bill of complaint in that regard.

7. Further answering, this defendant denies that plaintiff has a mechanic's or contractor's lien upon all or any contracts heretofore made by this defendant company, or its predecessor in interest, or upon any contracts which it may hereafter enter into with settlers for the sale of water rights or water to be taken from or through the irrigation system de-

scribed in the said complaint, as the same is now or may be hereafter constructed, and denies that plaintiff has, or is entitled to, a lien upon any mortgages constituting, to the extent of the unpaid portion of the purchase price of such water rights, first liens on the land irrigated thereunder; but this defendant avers that all such contracts and mortgages have been, and were, by this defendant company, at various times during the furnishing of materials referred to in the bill of complaint, assigned for value and delivered to The American Trust and Savings Bank and Frank H. Jones, trustees, as additional and collateral security for the payment of certain bonds issued by this defendant company for the purpose of procuring the money wherewith to construct said irrigation system, and that the moneys admitted by said plaintiff to have been [122] received by it from this defendant company on account of such materials were, to a large extent, the proceeds of the sales of bonds of this company secured in part by the transfer, assignment and delivery to said trustees of the contracts and mortgages referred to, and the said contracts and mortgages are now held and owned by the said trustee for the purpose for which the same were so transferred, assigned and delivered.

9. Further answering, denies that plaintiff has fully kept and performed its part of the agreement and contract referred to in the bill of complaint, or has furnished the materials required by it.

10. Further answering, this defendant denies that the sum of Fifteen Hundred (\$1500) Dollars is a

reasonable attorney's fee to be allowed to plaintiff in this action.

11. Further answering, this defendant denies that the dam at Mackay, Idaho, constituting a part of the irrigation system of this defendant, was, at the time of the filing of the bill of complaint, or is now, in such condition that more money should be, or is required to be spent upon it in order to protect the work that has already been done thereon.

As to each of the allegations of the bill of complaint herein not in this answer expressly admitted or denied, this defendant prays that the plaintiff may be required to make strict proof of each of such allegations of said bill of complaint as against this defendant.

WHEREFORE, this defendant prays to be hence dismissed with its costs and charges in this behalf wrongfully sustained.

BIG LOST RIVER IRRIGATION COMPANY.

By C. B. HURTT,
President.

LYNNE FOX CLINTON,
Attorney for Defendant, Big Lost River Irrigation Company. [123]

[Endorsed]: Filed March 1, 1912. [124]

[Title of Court and Cause.]

Order Appointing Receiver.

The matter of the application for the appointment of a receiver for the above-named defendant, Big

Lost River Irrigation Company, coming on to be heard and it appearing to the Court that the defendants above named have been duly notified to appear, H. H. Henderson, Esq., appearing as attorney and solicitor on behalf of the plaintiff in making the application, and N. M. Ruick, Esq., appearing as attorney and solicitor for the Big Lost River Irrigation Company and the Continental and [125] Commercial Trust and Savings Bank, successor to The American Trust and Savings Bank, trustee, and Frank H. Jones, trustee, and consenting to the appointment of such receiver and the other defendants not appearing in person or by counsel:

Upon reading and considering the verified bill in this cause, together with the affidavit of W. W. Corey, president of the plaintiff corporation, and it appearing to the Court that this is a proper case for the appointment of a receiver;

IT IS THEREFORE ORDERED by the Court that Jas. E. Clinton, Jr., resident of Boise, Idaho, be and he is hereby appointed receiver of the said Big Lost River Irrigation Company, defendant in said action and of all and singular the property, assets, rights, reservoirs, dams, canals, ditches, laterals, headgates, coolies, draws, flumes, rights of way and of flotage, easements, permits, privileges and franchises for dams, reservoirs, and ditches and laterals, and, in general, the entire works, project and system in Blaine, Bingham, Fremont and Custer Counties, in the State of Idaho, of the defendant, Big Lost River Irrigation Company, together with all other property in connection therewith, and all moneys, choses

in action, credits, bonds, stocks, leasehold interests, operating contracts, and other assets of every kind, and all other property, real, personal and mixed, held or possessed by the Big Lost River Irrigation Company. The said receiver is hereby authorized and directed to take immediate possession of all and singular the property above described, wherever situated or found, subject, however, to all rights and equities of any and all persons, associations or corporations therein; to have and to hold the same as the officer of and under the orders and directions of the Court.

And said Big Lost River Irrigation Company, and each and every of its officers, directors, agents and employees are hereby [126] required and commanded forthwith to turn over and deliver to such receiver or his duly constituted representative, any and all books of accounts, vouchers, papers, leases, deeds, contracts, bills, notes, accounts, money, or other property in its or their hands or under his or their control. Said receiver is hereby fully authorized to do and perform such acts as may be necessary to preserve the property of said Big Lost River Irrigation Company and to collect and receive all incomes therefrom and all debts due said company of every kind.

And said receiver is directed to deposit the moneys coming into his hands in some bank or banks in the city of Boise, State of Idaho, and to report his selection to the Court.

Said receiver is hereby fully authorized and empowered to institute and prosecute all such suits as may be necessary, in his judgment, to the proper

protection of the property and trust hereby vested in him, and likewise defend all actions instituted against him as receiver, and also to appear in and conduct the prosecution or defense of any and all suits or proceedings now pending in any court against said company, the prosecution or defense of which will, in the judgment of said receiver, be necessary and proper for the protection of the property, and rights placed in his charge, and for the interest of the creditors and stockholders of said company.

Said receiver is hereby required to give bond in the sum of \$5,000.00 with security satisfactory to this Court, for the faithful discharge of his duties, and is also required to make and file reports in this court quarterly, and at such other times as the Court may order.

And the Court reserves the right by orders hereinafter to be made to direct and control the payment of all supplies and materials, and in all other respects to enlarge, restrict, [127] regulate and control the powers and conduct of said Receiver.

Dated this 29th day of May, 1911.

FRANK S. DIETRICH,

District Judge.

And thereupon came in open court said James E. Clinton, Jr., and accepted such order and was thereupon duly sworn according to law and tendered bond according to said order, with, and, as sureties thereon, which bond is hereby approved and accepted.

.,

District Judge.

[Endorsed]: Filed May 31, 1911. [128]

[Title of Court and Cause.]

**[Stipulation That Certain Affidavits, etc., be Taken
and Considered as Evidence.]**

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties to the above-entitled cause, that the affidavits of Amos C. Miller, W. H. Rosecrans, Ralph G. Arnold, Samuel Storrow, and Frank Coy, and the letter of W. S. Collins hereto attached shall be taken and considered as part of the evidence in this cause, and the statements made by the said affiants and by the said W. S. Collins in said affidavits and in the said letter hereto attached shall be given the same force and effect as if such statements, and each of them, had been made by the said parties upon oath upon examination before the Special Examiner and by him certified and reported with the balance of the testimony taken before him in this cause.

IT IS FURTHER STIPULATED AND AGREED that the blue-print hereto attached shall be given the same force and effect as if regularly offered in evidence on the hearing of the cause before the said Examiner, with the identification and explanations contained in the affidavits and letter hereto attached. [129]

The said evidence is offered on behalf of the defendants, The Continental and Commercial Trust and Savings Bank and Frank H. Jones, as trustees, and is admitted subject to objections to relevancy

and materiality made by counsel for complainant to other testimony on the same subject matter.

Dated this 23d day of July, 1912.

H. H. HENDERSON,

Solicitor for Complainant.

MAYER, MEYER, AUSTRIAN & PLATT,

N. M. RUICK,

Solicitors for Defendants, Continental and Commercial Trust and Savings Bank, and Frank H. Jones, Trustees.

AMOS C. MILLER,

RICHARDS & HAGA,

Of Counsel for Defendants, Continental and Commercial Trust and Savings Bank, and Frank H. Jones, Trustees. [130]

[Title of Court and Cause.]

[Affidavit of Amos C. Miller.]

Amos C. Miller, being first duly sworn, states that he is one of the counsel for the defendant trustees in the above-entitled cause; that he attended the hearings and taking of testimony before Special Commissioner McCracken in Boise, Idaho, from June 21st to June 24th, inclusive; that he reached Chicago on the return from said trip on July 5th, 1912, and that the transcript of the testimony taken during the above-mentioned sessions reached affiant about July 8th, 1912, and about the same date affiant received a letter, a copy of which is hereto attached, from W. S. Collins, and also about said date received from said Collins the map, a blue-print copy of which is hereto attached, which map was made by said Col-

lins on his last visit to the Mackay dam as described in his said letter.

Affiant further states that during the above-mentioned sessions before said Special Commissioner McCracken testimony was produced by complainant tending to show that Ralph G. Arnold, an officer of the Arnold Company, and W. H. Rosecrans, also at that time connected with said Arnold Company, made certain statements to the effect that the Corey Brothers Construction Co. had done its work strictly in accordance with the contract, plans and specifications between the Big Lost River Irrigation Company and the Corey Brothers Construction Company; and as [131] affiant construed said testimony, tending to show an acceptance of said work by said Arnold Company through the parties above mentioned, to wit, said Arnold and said Rosecrans.

Affiant further says that to-day, July 13th, 1912, is the first opportunity that affiant has had since the receipt of said transcript of testimony to confer with said Ralph G. Arnold or said W. H. Rosecrans and that said Ralph G. Arnold and said W. H. Rosecrans have to-day stated to affiant as follows, and that they will so testify:

Said Ralph G. Arnold states the facts to be and that he will testify that during the whole year of 1910 he was the general manager of the office of the Arnold Company and its executive officer in charge of the office; that he, said Ralph G. Arnold, never was upon the site of the Mackay dam or the Big Lost River Irrigation project; that he is not an engineer and has at no time undertaken or assumed to pass

on any engineering question; that he at no time represented to C. B. Hurtt or William M. Wayman, or to any other person, that the work done by Corey Brothers Construction Company upon this Big Lost River Irrigation project was in accordance with the plans, specifications and contract between said Company and the Big Lost River Irrigation Company, and that the Arnold Company has at no time accepted the work done by said Corey Brothers Construction Company upon this project or issued a final certificate therefor.

That said W. H. Rosecrans states the facts to be and that he will testify that the last time he was either at the Mackay dam or upon any part of the irrigation system of said Big Lost River Irrigation Company was in September, 1909; that during the summer of 1910 he did not represent to C. B. Hurtt or to William M. Wayman, or any other person, that the work done upon the Big Lost River Irrigation project by Corey Brothers Construction Company was in accordance with the plans, [132] specifications and contract between said company and the Big Lost River Irrigation Company, and that the Arnold Company never, to the knowledge of said W. H. Rosecrans, accepted the work upon said project done by Corey Brothers Construction Company or issued the final certificate therefor, and that said W. H. Rosecrans severed his connection with the Arnold Company in the month of August, 1910.

Affiant further states that on this day he has had his first opportunity of conferring with Frank Coy since the receipt of said transcript; that said Coy

states the facts to be and states his willingness to testify that no men were discharged by him who were engaged in the work of driving sheet piling; that the only men employed by him for such work were a few so employed after said Coy had applied to Corey Brothers Construction Company for men for said work, and said Corey Brothers Construction Company had been unable or failed to get the necessary men; that said Coy before or about the time that the excavation was begun from the borrow-pits drove stakes all over the ground covered by all the borrow-pits, took the elevations of such stakes and preserved the same for future reference in order to know the amount of material excavated by the contractor; that in doing that work he marked all the ground out in squares of fifty feet (50'), and that the above were all the stakes driven in the vicinity of the borrow-pits by or under the supervision of said Coy.

Affiant further states that he has drafted affidavits for each of said three (3) parties to sign, which drafts are strictly in accordance with the statements of said persons, but that affiant was unable to get said affidavits written out in time to be sworn to by said parties to-day, and that the same [133] will be duly signed and sworn to on Monday, the 15th instant, and forwarded to Oliver O. Haga of Boise, Idaho.

Affiant further states that when the above testimony was offered by counsel for the complainant at the session above referred to, held in Boise, affiant duly objected to the offering of the testimony at that

time on the grounds,

First: That it was not proper rebuttal.

Second: That if intended as impeaching evidence, no foundation was laid by questioning the witnesses at the cross-examination.

AMOS C. MILLER. [134]

[Title of Court and Cause.]

[Affidavit of Ralph G. Arnold.]

Ralph G. Arnold being first duly sworn, states that during the whole of the year 1910 he was secretary, treasurer and acting general manager of the office of the Arnold Company, and its executive officer in charge of the office; that he, said affiant, never was upon the site of the Mackay dam or Big Lost River Irrigation project, and had no personal knowledge of the character of the work there done; that he is not an engineer and has at no time undertaken or assumed to pass on any engineering question; that he at no time represented to C. B. Hurtt or William M. Wayman or any other person that the work done by Corey Brothers Construction Company upon the Big Lost River Irrigation project was in accordance with the plans, specifications or contract between said company and the Big Lost River Irrigation Company, and that the Arnold Company has at no time accepted the work done by said Corey Brothers Construction Company upon this project or issued a final certificate therefor.

RALPH G. ARNOLD. [135]

[Title of Court and Cause.]

[Affidavit of Frank Coy.]

Frank Coy being first duly sworn states that while he was engineer upon the dam near Mackay, Idaho, of the Big Lost River Irrigation Company, he discharged no men engaged in any way in the driving of the sheet piling, and employed no men for that work except a few that he so employed after he had applied to the Corey Brothers Construction Company for such men, and the latter had either been unable to or failed to supply the necessary men;

That at or about the time the excavation work began from the borrow-pits at the Mackay dam affiant staked out all the ground in the vicinity of the borrow-pits, and owned by said irrigation company, dividing said ground into squares of fifty (50) feet and taking the levels of said stakes for the purpose of future reference to assist affiant in ascertaining the amount of material excavated from said pits, and that no other stakes were driven there by or under the supervision of affiant.

FRANK COY. [136]

[Title of Court and Cause.]

[Affidavit of W. H. Rosecrans.]

W. H. Rosecrans being first duly sworn states that the last time that he was ever either at the site of the Mackay dam near Mackay, Idaho, or upon any part of the irrigation system of the Big Lost River Irrigation Company was in September of 1909; that during the summer of 1910 affiant did not represent

to C. B. Hurtt or William M. Wayman or to any other person that the work done upon the Big Lost River Irrigation project by Corey Brothers Construction Company was in accordance with the plans, specifications or contract between said company and the Big Lost River Irrigation Company, and that the Arnold Company never to the knowledge of affiant accepted the work upon said project done by Corey Brothers Construction Company or issued a final certificate therefor, and affiant severed his connection with the Arnold Company in the month of August, 1910.

W. H. ROSECRANS. [137]

[Title of Court and Cause.]

[Affidavit of Samuel Storrow.]

Samuel Storrow being first duly sworn states that he is the same Samuel Storrow who has heretofore testified in this case; that he has examined the map entitled: "Map showing relative location and elevations of spillway, test-pits, borrow-pits and water levels in reservoir and below dam, Mackay dam scale one inch to one hundred feet," signed by W. S. Collins, and purporting to have been made from surveys made on June 23d, 26th and 27th, 1912.

Affiant further states that the three test-pits described as follows on the above-mentioned Collins map: "Test-pit No. 1, 11.8 feet deep; test-pit No. 2, 21.5 feet deep; test-pit No. 3, 21 feet deep" were dug at his request and in his presence at the time of his visit to the Mackay dam as heretofore stated in his evidence; that at the time when these pits were completed the water surface in the reservoir of the

dam and the water surface in the state spillway and the water surface in the pool below the dam were all of them materially higher than as shown on the said Collins map, and that the test-pits above mentioned were dug until they reached about six inches into the underground water plane which extends from the [138] surface of the water in the reservoir to the surface of the water in the pool below the dam.

Affiant further states that he made measurements with a steel tape to show the fluctuation of water level at the bottoms of these several pits and also made similar measurements in other places where the surface of the underground water plane was exposed; that these measurements were made also by the engineers then on the ground and as the level of the water surface in the reservoir and in the spillway and in the pool below the dam gradually lowered, owing to the diminish of the Big Lost River, the surface of the underground water exposed in the pits also lowered in accordance therewith until the bottoms of the pits became dry at a time when the reservoir water surface had lowered about one foot, but when it was at a higher level than as shown in the above-mentioned Collins map.

Affiant further states that each of these three pits has partially filled up and are none of them now as deep as at the time when they were dug and measured under his supervision. Assuming that the water in the reservoir and in the state spillway and in the pool below the dam is at the several elevations shown on the Collins map, and that the bottoms of the three test-pits are at the elevations stated on that

map, affiant considers it impossible that water could be found at the bottoms of those test-pits at the elevations stated on the Collins map, because the test-pits were originally dug to just intersect the hydraulic gradient when said gradient was at a materially higher elevation at a time when the Big Lost River was at flood and that this hydraulic gradient slowly sank as the flow of the river diminished until said gradient sank below said test-pits, and that this experiment proved conclusively that the hydraulic gradient extending from the surface of the reservoir above the dam to the surface of the pool below the dam [139] measured along the line of the said test-pits fluctuated and continues to fluctuate with relatively minor variations of the water surfaces stated, and therefore, proves conclusively to him as an engineer, and he so states it to be a fact, that the composition of the material through which the test-pits were sunken and the composition of the material underlying them through which the water previously reached the said test-pits, is so open and porous as to permit the hydraulic gradient to sink very rapidly after leaving the surface of the reservoir.

Affiant further states that the pool on the right bank on top of the dam over the core-wall was carefully observed by affiant at the time of his visit. It was a running pool delivering a stream of water exceeding one second-foot, which water entered it coming through the fill between the pool and the reservoir and left the said pool by flowing over the top of the core-wall and thence sinking down into the

body of the dam below the core-wall.

And further affiant saith not.

SAMUEL STORROW. [140]

[Letter, Dated July 1, 1912—W. S. Collins to Amos C. Miller.]

COPY.

July 1, 1912.

Mr. AMOS C. MILLER,
New York Life Bldg.,
Chicago, Ill.

Dear Sir:

In accordance with your request I returned to the Mackay dam and completed the survey of test-pits, spillway, borrow-pits, etc. I located the two additional pits near the core wall, one above and one below as shown in the photographs.

The water in the reservoir had risen two feet from Sunday noon to Wednesday afternoon, and about 25 sec. ft. was flowing through the spillway. A pool about 100 ft. long and 50 ft. wide had arisen in the dam due to seepage from either the reservoir or the spillway or possibly from both.

The accompanying map shows the relative location of the test-pits, spillway, borrow-pits, etc., and the relative elevation of the same and also of the water in the reservoir in the pool and below the spillway.

I trust this will give you the information desired and will be of service.

Yours very truly,

W. S. COLLINS. [141]

Map attached to this Stipulation omitted at request

of counsel for appellant, to be forwarded with original exhibits.

Stipulation approved.

July 23, 1912.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 23, 1912. [142]

[Testimony—Evidence.]

This cause coming on for hearing the 5th day of April, 1912, before R. M. McCracken, Special Examiner, duly appointed by the Court to take and report the testimony, the following proceedings were had, to wit:

Plaintiff offered in evidence the following exhibits:

Plaintiff's Exhibits, No. 1 and No. 2, being segregation lists No. 8 and No. 18, segregating approximately 100,000 acres of land under Carey Act, substantially all of said lands being situated under the irrigation system described in plaintiff's complaint.

Exhibit No. 3, Water Permit No. 1570.

Exhibit No. 4, Water Permit No. 1513.

Exhibit No. 5, Water Permit 1748.

Exhibit No. 6, Water Permit 4061.

Exhibit No. 7, Water Permit 4062. [143]

Exhibit No. 8, Water Permit 4063.

Exhibit No. 9, Water Permit 4946.

Exhibit No. 10, Water Permit 4960.

Exhibit No. 11, Water Permit 4101.

Exhibits 12, 13, 15, 16 and 17 are deeds, assignments, and transfers from George S. Speer to Big

Lost River Irrigation Company of all water rights, water permits, rights of way, and contracts with the State of Idaho for the construction of irrigation works acquired or held by the said George S. Speer.

Exhibit No. 14, agreement with the State of Idaho and George S. Speer, dated May 27th, 1909, for the construction of what is known as the Big Lost River Project, said agreement being made under the Act of Congress, commonly known as the Carey Act, and the laws of the State of Idaho passed pursuant to said Act of Congress.

Exhibit No. 18, general map showing lands segregated and their situation relative to the irrigation works constructed by the Big Lost River Irrigation Company.

[Testimony of Goyne Drummond, for Plaintiff.]

GOYNE DRUMMOND, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct Examination.

(By Mr. HENDERSON.)

I live at Riverton, Wyoming; my business is engineering and surveying. I was employed upon the Big Lost River Irrigation Company project, first as assistant engineer, then as engineer in charge; was in charge from July, 1909, to September, 1910. This system is in the counties of Blaine, Custer, Bingham, and Fremont. Corey Brothers Construction Company did the work thereon. I can locate some of the canals on Exhibit 18. The Corey Company constructed about 200 miles of canals; they also constructed the dam as far as completed. I first did

(Testimony of Goyne Drummond.)

a portion of the contour [144] work; located and cross-sectioned a portion of the Blaine canal and was then put in charge of the rest of the work. Rosecranz acted as chief engineer. I gave certificates to Corey Brothers. Exhibit No. 19 is an estimate for work up to July 31, 1910. I delivered that to Corey Brothers. I was working for the Arnold Construction Company and the Big Lost River Irrigation Company. When I made that estimate there was no other resident engineer. Exhibit No. 20 is a certificate for work during August, 1910, and all previous work from June, 1909. It was correct. Rashbocker gave Corey Brothers directions while I was there. He was the engineer in charge prior to the time I took charge. I gave Corey Brothers instructions as to where I wanted the work done, canals, laterals and dams. I was acquainted with the contract between Corey Brothers and Big Lost River Irrigation Company. I gave them all the instructions that were necessary to do the work, how I wanted certain materials placed in the canals, and what work on the canals and laterals I wanted first completed. Corey Bros. Construction Company followed the terms of this contract with Big Lost River Irrigation Company in doing that work. I graduated from the engineering department at the Ohio Northwestern University in 1883; have been an engineer continuously ever since. I went to work for the Arnold Company on this job in February, 1909. I was field engineer under Rashbocker who then had charge of the work; was afterwards under the supervision of the Arnold Company.

(Testimony of Goyne Drummond.)

The Big Lost River Irrigation Company owe me about \$500.

[Testimony of C. B. Hurtt, for Plaintiff.]

C. B. HURTT testified as follows:

I am president of the Big Lost River Irrigation Company, have been since the company's organization, June 16, 1909. [145]

Exhibit No. 21 was introduced on behalf of plaintiff, same being a certificate issued by the Secretary of State of the State of Idaho showing the incorporation of the Big Lost River Irrigation Company under the laws of the State of Idaho on the 15th day of June, 1909, and that said corporation was thereby authorized to do business in said State.

Exhibit No. 22 was also introduced, the same being a certified copy of the articles of incorporation of the Big Lost River Irrigation Company.

I was one of the incorporators of the Big Lost River Irrigation Company. A written contract was made between the Big Lost River Irrigation Company and Corey Brothers. It was dated July or August, 1909. Corey Brothers had done work on the project before that was signed.

Exhibit No. 23, contract between Corey Bros. Construction Company and the Big Lost River Irrigation Company.

This is a contract under which Corey Brothers did the work from that time on. Prior to the date of this contract we had an oral contract with Corey for doing this work. When Speer of the Trowbridge & Niver Company acquired the Big Lost River Irri-

(Testimony of C. B. Hurtt.)

gation Company project Speer and Rosecranz were here and they sent for Corey. I was present, and we discussed the construction of the system. That was between May 1 and May 15, 1909. It was verbally agreed Corey should go ahead and construct an irrigation system and dam. The work commenced about the middle of June, 1909. W. H. Rosecranz was the chief engineer. **Rashbocker was one of his assistants** on the ground, resident engineer, and later Drummond; Drummond was the engineer on the ground. There was no contract in writing with him. The contract was with the Arnold Company, not with Drummond. Drummond was acting for the Big Lost River Company as engineer in charge of that work through [146] the Arnold Company. Rosecranz was the man in charge of the irrigation department of their business. The Big Lost River Irrigation Company recognized Drummond, Rosecranz and Rashbocker as the engineers in charge of the work while Corey Brothers were working. There were no other engineers representing the Big Lost River Irrigation Company.

When we were approaching the time when we had to arrange for cement, either Rosecranz or Speer asked Corey to make the best arrangement he could for the cement. That was the last of June or first of June, 1909. Corey did so. The bills were sent to the office. That is my signature as president of the Big Lost River Irrigation Company to this cement contract.

Cement contract offered in evidence as Exhibit

(Testimony of C. B. Hurtt.)

No. 24, dated September 18, 1909.

According to the best of my knowledge the Union Portland Cement Company furnished cement under this contract. Speer was vice-president of the Trowbridge & Niver Company. The latter was a bond-house in Chicago. They had the financiering of the project. This is the minute-book of the Big Lost River Irrigation Company. I first became president according to the records July 16, 1909. From the time the company was incorporated it was generally understood I would be made president. Corey Brothers Construction Company partially constructed the dam and canal system. The dam is incomplete. They did all the work on it that was done. I was over the entire system while they were working. I cannot say what percentage of the canal system was done. The Big Lost River Irrigation Company had nobody else doing work on the dam or canal except Corey Bros. Construction Company, unless they were Corey's subcontractors. We had an executive committee of the Big Lost River Irrigation Company consisting of Clinton, Ruick and myself. This appears on page 56 of the minute-book. [147] The first board of directors were Clinton, Jr., Ruick, Oppenheim, Roos and myself. The board of directors were elected July 16, 1909. This appears on page 41 of the minute-book. In the fall of 1909 Ruick and Oppenheim resigned and Roos and Speer were elected. That was January 11, 1910. These persons afterwards acted as directors of the Big Lost River Irrigation Company. The Big Lost River Irri-

(Testimony of C. B. Hurtt.)

gation Company is unable to pay its debts. It was in that condition in March, 1910, and ever since; it has been insolvent all that time. If a judgment should be obtained against the company the system should be sold as a whole.

Cross-examination.

(By Mr. BUDGE.)

Part of the segregations were made by the Big Lost River Land & Irrigation Company, which was a former company. The transfer was made to Speer in May and from him to the present company, about July 16, 1909. Speer had title about two months. He acquired the title from the Big Lost River Land & Irrigation Company.

[Testimony of A. T. Corey, for Plaintiff.]

A. T. COREY testified as follows:

I live at Ogden, Utah. I am a stockholder, vice-president, and secretary and treasurer of Corey Bros. Construction Company. In 1909 R. D. Roberts was secretary. I was upon the work of the Big Lost River Irrigation project during 1909 and 1910; was bookkeeper and paymaster for the Corey Bros. Construction Company, which company was the contractor. W. W. Corey was general manager and president. We started work in June, 1909, and quit work in August, 1910. I was practically on the ground, most of the time at the dam. (Here the witness is asked the names of the various subcontractors who did work on the project.)

I don't know whether there was written consent to
[148] sublet by the Big Lost River Irrigation Com-

(Testimony of A. T. Corey.)

pany. \$1,394.55 is due to Molin & Kutler; due to Curd & Foss, \$5,687.86; to Molin Bros., \$1,933.63; to Frank Hess, \$7,234.05; to S. H. Walton, \$5,849.34; to F. S. Pinney, \$2,662.27; to Chamberlain Bros., \$4,823.98; to Hanson Bros., \$17,492.33. These various amounts include the 10 per cent.

Cross-examination.

(By Mr. HENDERSON.)

These amounts are given according to the estimates of the engineer of the Big Lost River Irrigation Company.

Cross-examination.

(By Mr. RUICK.)

I know these amounts only from the engineer's estimates; have no personal knowledge. These amounts are shown on the books of the Corey Bros. Construction Company. I don't know anything further about them. I had charge of the books; and Mr. Higinbotham a part of the time. He was book-keeper in the Ogden office. Drummond was the engineer in charge of the work most of the time. I don't know whether these engineers were in the employ of the Big Lost River Irrigation Company or of Arnold Company. The estimates on which the entries in the books are based are either here or in Ogden.

Redirect Examination.

Corey Bros. Construction Company accepted these estimates as being correct.

(Testimony of A. T. Corey.)

Recross-examination.

(By Mr. HENDERSON.)

They are correct as far as I know according to the estimate of the engineer. No other engineer gave estimates while Drummond was there in charge.

Recross-examination.

(By Mr. RUICK.)

All I know is that Drummond and Rashbocker were upon the work and furnished the estimates. The reason I know they were employed by the Big Lost River Irrigation Company was because [149] they were the only engineers in charge and gave us instructions as to how to do it and issued certificates for payment which were paid.

Cross-examination.

(By Mr. HAGA.)

I don't know of a single estimate having been paid on Drummond's own signature without the signature of other engineers; the chief engineer approved the estimates. I don't know of any of Drummond's estimates that were paid that were not approved; I don't know of any of his estimates that were changed before being paid.

[Testimony of W. W. Corey, for Plaintiff.]

W. W. COREY testified as follows:

(Examined by Mr. BUDGE.)

I am president and general manager of the Corey Bros. Construction Company for three years. The Big Lost River Irrigation Company project is in the counties of Custer, Blaine, Bingham and Fremont,

(Testimony of W. W. Corey.)

Idaho. The Corey Bros. Construction Company did the work. Began about June 15, 1909. Rashbocker was the engineer in charge at first; Drummond was his subordinate. Rashbocker left in July or August, then Drummond was in charge until August, 1910.

(Here the witness is questioned about subcontractors.)

Neither the Big Lost River Irrigation Company or its president ever stated to me who would furnish estimates on this project. Rashbocker was engineer in charge at first, and then Drummond. All the work by the subcontractors was by general supervision of them. Also the work of the Corey Bros. Construction Company. Hurtt, the president, told us we would take our orders from Rashbocker first and afterwards from Drummond. My company recognizes the estimates as given by the engineers of the subcontractors as correct; we think them to be. Their work was grading and building canals. Did no work on the dam. [150]

[Testimony of Orson O. Corey, for Plaintiff.]

ORSON O. COREY testified as follows:

I am a stockholder and director of the Corey Bros. Construction Company. I was upon the canal system constantly during 1909 and 1910. In charge of the work for the Corey Bros. Construction Company. Frank Hess, Molin, and Kutler, F. L. Pinney, Curd & Foss, Molin & Molin, S. H. Walton, Chamberlain Brothers and Hanson Brothers performed work on the project. Nearly all quit in August, 1910; Walton quit a little earlier. These men did work on the

(Testimony of Orson O. Corey.)

canals but were scattered along the country forty or fifty miles. The nearest one to the dam was Hess, about fifteen miles away. I had immediate charge of the work of these subcontractors. Drummond and Rashbocker directed me. They were the chief engineers. They had a lot of subordinates. They were the men we took our orders from.

(Here the witness states when the various subcontractors began work.)

Mr. Budge offers in evidence pleadings in the State court case.

Various claims for liens offered in evidence.

**[Testimony of C. B. Hurtt, for Plaintiff
(Recalled),]**

C. B. HURTT, being recalled, testified as follows:

This minute-book shows the by-laws of the Big Lost River Irrigation Company, offered in evidence as Exhibit 25, and sections 4 and 5 of Article IV, read as follows:

“Sec. 4. President. The President shall preside at all meetings of the Board of Directors and of the stockholders. Present at each regular meeting of the stockholders a report of the condition of the business of the company.

“Appoint and remove subject to the approval of the board of directors, all officers, agents, and employees and representatives of the company, other than the vice-president, secretary and treasurer, and fix their compensation.

“Make and sign all contracts and agreements on behalf of the company, and see that they are prop-

(Testimony of C. B. Hurtt.)

erly carried out. [151]

“Do and perform all acts incident to the office of president, or which are authorized and required by him by the by-laws or the laws of the State of Idaho.

“Sec. 5. Duties of Directors. The Board of Directors shall have the control and general management of the affairs and business of the company. Adopt such rules and regulations for the conduct of their meetings and the management of their company as they may deem proper, not inconsistent with the laws of the State of Idaho, or these by-laws.”

The minutes of the meeting of the board of directors of the Big Lost River Irrigation Company, held on the 16th day of July, 1909, and found upon pages 55 and 56 of the minutes of said company, were offered in evidence as Plaintiff's Exhibit No. 26.

The minutes of the meeting of the board of directors of the Big Lost River Irrigation Company, held on the 21st day of August, 1909, and found upon pages 59, 60 and 61 of the minutes of said company, were offered in evidence as Plaintiff's Exhibit No. 27.

From June 15, 1909, to August 26, 1909, Corey Bros. Construction Company was working in the construction of the Big Lost River project for the Big Lost River Irrigation Company.

Exhibit No. 28, map of the Big Lost River Irrigation Company project by Arnold Company, offered in evidence with the file-mark of the State Engineer's office.

Exhibit No. 29, another map of the system, offered in evidence.

**[Testimony of Goyne Drummond, for Plaintiff
(Recalled).]**

GOYNE DRUMMOND, being recalled, testified as follows:

I located the site for the dam for the Big Lost River Irrigation Company early in March, 1909. The Corey Bros. Construction Company did all work they did on the ground I located for the dam. I was at the dam site every week or ten days; I was all over the works and canal system. Corey Bros. [152] constructed all of the work on the dam that was constructed, also on the canals and laterals. The canals and laterals are about 95 per cent completed.

Cross-examination.

(By Mr. MILLER.)

I surveyed the dam site early in March, 1909. Rashbocker was then my immediate superior. He spent probably a fourth of his time between February and July either on the canals or dam site. Rashbocker's headquarters were at Mackay. When I say he was on the ground only one-fourth of the time. I mean where I was. I worked from the Canadian to the Mexican line on canals and railroads and mining engineering and subdivisions, supervised dams for the Wyoming Development Company for the Wheat Land Irrigation project about 100 miles north from Cheyenne. That dam was made of cribbed rock; also several small reservoir dams. That crib

(Testimony of Goyne Drummond.)

rock dam was 10 feet wide by 125 feet long. Water face was loose rock and gravel. I supervised no other dams except a few small ones, probably 20 feet high, and very short for small irrigation reservoirs. These were open dams. There were two of them at Wheatland. The open dams northwest of the Wheat Land was 20 feet high and 200 feet long. That is all the dams I have supervised the construction of. The earth dam was gravel and loam. The water head was 4 feet at the top. There was no core; no puddling done.

In April, 1909, I familiarized myself with the contract, plans and specifications of the Mackay dam. They were all attached together. I don't know whether the Coreys' bid was attached, but the prices of material were in that contract, in the schedule of the various kinds of work. I took occasion to familiarize myself with the plans and specifications to enable me to see that the work was carried out in accordance therewith. I think the Corey Bros. Construction Company began work about the middle of June. Rosecranz [153] was chief engineer, as we understood it. So far as I personally knew he was present on the work twice. I presume the work began on June 10, 1909, as it states in the certificates. While the dam was in progress I was there every week or ten days. The balance of the time I was on the canals and laterals. Coy, my assistant, was located on the dam. He went there a short time before its construction began. The dam was begun some time in June, possibly before that. Coy was there

(Testimony of Goyne Drummond.)

two or three months after the construction began. This certificate states that the work began on June 1, 1909. So far as I know that is correct.

I presume I had a copy of Plaintiff's Exhibit 23, the contract between the Corey Bros. Construction Company and the Big Lost River Irrigation Company.

Defendant's Exhibit 1 is one of the maps referred to in the contract, or a copy of it; also Exhibit No. 2 and 3, and 4, and 5 and 6 and 7 and 8 and 9. All these were received from my employer, the Arnold Company, either before the work started or during its progress.

In July, August or September, 1910, I drew a salary from the Big Lost River Irrigation Company. That was for operating and maintaining the canals when we turned the water in. And the other work I did for the Big Lost River Irrigation Company was under the employment of the Arnold Engineering Company, whose employ I left in August, 1910. I left the Big Lost River Irrigation Company's employ in September, 1910.

On the plans and specifications the spillway was designed to be constructed as an open cut, but we built a tunnel for about 50 feet. There is no such tunnel shown on the blue-prints. It is shown as an open cut. When they began excavations the work was such that if we shot this portion of the material down it would weaken that portion of the dam and throw [154] the material on the core. That is why we drove the tunnel instead of making an open

(Testimony of Goyne Drummond.)

cut. It did not reduce the size of the spillway. The tunnel was 12 or 14 feet high. It did not reduce the capacity of the spillway in the least. The tunnel is just as good as an open cut if it has got the area that the open cut has; debris would not be any more likely to catch than in an open cut in that position. There is no more friction in a tunnel, no more liability to being stopped up. I supervised the construction of a tunnel for water at the Wyoming Development Company Wheat Land which I have mentioned. That tunnel was 7 by 8. Debris would not be any more likely to catch in the tunnel. We were afraid that by shooting out the rock it would damage the core-wall and shatter the solid rock forming the cliff and causing openings and obstructing the work below. It would shatter this mountain of rock. Then the rock falling near the core-wall would have to be removed again. It was cheaper to drive a tunnel than to carry all this mountain of rock away. We did use dynamite in driving the tunnel. We could not leave the broken rock near the core-wall. A portion of rock was put in the dam, in the southwest portion, below the core-wall. Some of this came within 20 feet of the core-wall. All of the loose rock excavated from the cliff was left in that place. There was clay in that rock that came from the crevices. There was only a little of this rock that was within 20 feet of the core-wall. That material was not called for in the specifications to be put in the dam. The specifications did not call for placing that material in the dam. It was contrary to the

(Testimony of Goyne Drummond.)

specifications so far as they go to put that class of material in the dam.

Defendant's Exhibit No. 10 (Bifurcation on Blaine Canal) is one of the drawings from which the work was constructed and [155] which we had during the construction. I don't know that the State Engineer condemned the piling of the rock within the dam; I don't remember that on December 29, 1910, the State Board of Land Commissioners entered an order ordering the removal of that rock.

Defendant's Exhibit 11 (Antelope Creek Crossing) is one of the drawings we had during the construction of the work and from which it was constructed. It came from the Arnold Company. I was last at the work in October, 1910. All the work that had been done had been done by the Corey Bros. Construction Company. The syphon and the weir and the Antelope Creek crossing were constructed according to the plan I had.

Photograph, Defendant's Exhibit 12, shows the construction of the Antelope crossing.

"Q. I will also ask you to look again on this map entitled exhibit 11, at another portion of it, the portion marked here, entitled Section BB. What does that indicate as to openings?

A. That indicates that there is two openings there.

Q. Two openings below the bed of the canal, the bottom of it?

A. Two openings—there is two openings, the openings, I think, into the canal, as near as I can

(Testimony of Goyne Drummond.)

tell from that.

Q. Openings into the canal? A. Yes, sir.

Q. Then what does it show above that—any openings? Answer as soon as you can, Mr. Witness, so that we can get along.

A. I will do that. Those show the openings into the canal.

Q. Yes, you are pointing now to the two openings? A. Yes, sir.

Q. Which we will mark A and B?

A. Yes, sir.

Q. And the last question I asked you was whether it showed four openings above that.

A. It does not. [156]

Q. You do not call those openings?

A. I wouldn't call those openings, no, sir.

Q. How then do you find the openings here below there, at A and B, what is there there to indicate openings at A and B?

A. Well, I would indicate by the manner in which that opening was placed there.

Q. Well, will you tell what there is here to indicate an opening at A and B and none at C, D, E, and F?

A. No, I can't see that there is anything there but what those are shown as openings in that right there.

Q. Well, then, you said a minute ago—

A. Had they been closed they would have been evidently marked as the concrete is marked.

Q. So that you wish to change your testimony

(Testimony of Goyne Drummond.)

given a minute ago in which you said it showed no openings at C, D, E, and F, don't you?

A. Yes, those are marked on that as openings, just looking at it that way as openings.

Q. There couldn't be any possible doubt about it in the mind of any civil engineer, could there?

A. That those are marked as openings?

Q. Yes. A. There might be.

Q. There might be with a crazy civil engineer?

A. I don't know.

Q. Any sane engineer, there wouldn't be any doubt about it, would there?

A. I don't know about that.

Q. You never saw one that would have any doubt about it?

A. I have seen them, but whether they would have any doubt I don't know.

Q. In other words, it is as plain as it could be made that they are openings.

A. It is shown as openings.

Q. Now, we have got down to it. Referring again to this Exhibit 12, being a photograph of the same structure, are there any openings there, at the places indicated?

A. I can't tell whether those are openings by that photograph or not. [157]

Q. Well, now, you are pointing now to the openings immediately above the water, aren't you?

A. Yes, sir.

Q. And a long distance from the top of the concrete structure, aren't you? A. Yes, sir."

(Testimony of Goyne Drummond.)

I cannot detect on the photograph any openings in these works at the place indicated on C, D, D, & S of Exhibit 11. As near as I can remember the openings were there, but they don't show now. I don't say it was changed. I have no reason to think they were changed.

We got orders from our chief engineer whenever any changes were necessary we could make them, that was verbally from Mr. Rosecranz. I might have ordered changes; I don't remember. I always gave my men under me verbal instructions. I cannot conceive of any reason for leaving out those openings in that structure. I know the structure was wrecked, but I understand it was because they turned the water in and had no one to operate it. I cannot see how the openings would have a tendency to prevent the wreck; there were no openings in the downstream side in the canal. In case of a flood in Antelope Creek, if there were none of those openings except two underneath the canal all the water would have to go through those two openings; if there were four openings above the water could go through them if we wanted to use it in the canal. We could allow it to go through there; that might help to save the structure in case of a heavy flood, six openings instead of two.

“Q. I show you a map heretofore identified as Defendants' Trustees Exhibit 6, entitled 'Intake Controlling Works for Blaine Canal.' Were those works constructed in accordance with this plan?

A. The gate, the structure for the setting of the

(Testimony of Goyne Drummond.)

gate into the canal, as near as I can remember, were put in according to this or a very similar drawing. [158]

Q. What was the difference?

A. I don't see—I can't tell any difference unless I had this and compared it with the one which I had."

The intake controlling works for the Blaine Canal differed from the plan in that the dam was 125 feet instead of 150 and the tainter gate was on the opposite side of the reservoir; that was just as good on the other side of the reservoir. With the nature of that stream you have no mud to contend with. The ice which collects where the water settled, if you put a gate there it would draw the water away from the head-gates. We wanted to draw the water away from the head-gates to prevent it freezing there. That was my idea. I submitted to the Arnold Company's engineer a sketch of the gate and was told to put it in accordingly. I don't know where the sketch is. It came back to me. I presume I left it with the Arnold Company's engineer, Mr. Binkley. I think it was approved by Farnsworth. The head-gates of the Darlington Canal were constructed adjacent to our head-gates, between them and the dam. It is not so shown on the plan. It was done with Darlington's consent.

The wall was built 10 feet in length and not 100 feet. I don't know what that hundred feet of high wall was intended for. I think Rosecranz, as near as I remember, gave verbal consent to that change,

(Testimony of Goyne Drummond.)

either gave it to me or to Rashbocker, and Rashbocker, gave it to me. It was all verbal. We didn't have to take our orders in writing from our superiors. I don't remember whether I gave any written orders from the Corey Bros. Construction Company. I don't remember anything about it.

I had under me Jones, Huff, Wiles, Brims, Thomas and Liverman.

Defendants' Exhibit 7, entitled "Details of Concrete Drops, Flumes and Canals," shows four columns of concrete at the head of the drops. In one of the drops there were two columns; [159] in the others they were omitted entirely. I don't think I gave the Corey Bros. Construction Company any written order to do that. Anyway, we got instructions from Rashbocker verbally to do that. Those were put in in 1909 and 1910. Rashbocker was on the job several times after he left in July, 1909. Whenever he was there he was my superior. I regarded Rashbocker as my superior whenever I had instructions from Rosecranz.

On Defendants' Exhibit 10, entitled "Plan of Canal and Bifurcation Works," the places marked A, B, C, D, and E are shown as openings. As near as I can remember they were so constructed. I don't remember as to that. This photograph of that structure shows concrete work up to within a very short distance of the top of the structure. I cannot say whether it shows very much less opening than is shown upon the blue-print; I don't think the reason

(Testimony of Goyne Drummond.)

for the wrecking of that structure was the inefficiency of the openings.

The ground on which the large dam rested was placed before filling in. I know that the Carey Act inspector objected that on portions of it that had been plowed they were going back and forth with teams and it was thoroughly packed again, and we did plow it, as near as I can remember, two or three times, that portion of it. I don't remember whether it was plowed once or twice. I don't know that a large portion was plowed at all. I don't think that the fill across the concrete wall was made partially by dumping from a trestle crossing the wall; it may have been, but I don't remember. There was one diagonal track crossing the core-wall; there might have been another one at another time.

Defendant's Exhibit 14 is a pretty good photograph as to how the dam looked in the course of construction. Not all of [160] this fill that is shown along the trestle nearest the front of the picture was made from that trestle; you couldn't tell from the picture. The line between the bottom and the fill is parallel with the top of the trestle. At the next place where the track crosses the core-wall, that shows it was dumped from the top of the trestle if the trestle was over the top of that. I don't think the third trestle crosses the core-wall. The specifications state the material should be dumped parallel with the core-wall. I think Rosecrans or Rashbocker gave permission to put the fill in this way; I don't remember; it was verbal. The space for dumping material in

(Testimony of Goyne Drummond.)

the dam was not sufficient to keep running right parallel with the core-wall until we came clear across, so this was constructed to within 20 feet of the top of the lift; then we gave them permission to cross this core-wall in order to come around to fill this on this side until they could get up to catch one of those other lifts. I gave Corey Brothers permission to cross the core-wall of the dam as they crossed from the diagonal track. Jones spoke to me about it and I told him to have them do that. I don't know whether Jones gave it to them in writing or not. I don't know whether Roberts, the Carey Act engineer, ordered it stopped. I asked him what his objection was and he said it was just as good, but was not according to specifications. I understood Roberts made a complaint to Mr. Martin; I understood that the specifications provided that all dumping should be toward the core-wall from a trestle on each toe so as to make it as nearly water tight as possible; but we sluiced in toward the dam. The effect of dumping without sluicing from the 25 foot trestle is that the coarser material will go to the bottom and the finer will stay on top.

Q. Then when you dumped from a diagonal trestle you got coarse material all the way up, didn't you?

A. No, sir. [161]

Sluicing down the diagonal fill will get same strata as if you are sluicing in from the outer toe; I know that the effect of it was that streams of water aggregating 50 second-feet went through the dam, but it

(Testimony of Goyne Drummond.)

is not so now; your experts are mistaken on that, all of them.

Defendants' Exhibit 15 is a photograph of the diversion works of the Blaine Canal.

I would not have admitted anything like that dumping from a 25 foot trestle at an angle of 45 degrees from the core-wall if it could in any way have been conveniently avoided; I might have told Mr. Roberts that in my opinion that was just as good; I don't know whether I told him it was cheaper, I might have. The contractor on the work was being paid by an estimate. Had my judgment told me that a little material going in there at that place and crossing there would weaken the structure I would not have put it in that way; I would have avoided it if conditions should have been such—in my opinion as an expert dumping from a trestle 25 feet high at an angle of 45 degrees to the core-wall would be very little different from the structure, according to the plans and specifications if properly sluiced, but if I were to have it done I would have it done parallel to the core-wall from the outside end, because I think it is a little bit better. It is better; there is no question about that; but the conditions were such I either had to stop him from work or else allow him to come in this way. I cannot see why dumping parallel with the core-wall and then sluicing in you would get a larger percentage of fines next to the wall than there was in the borrow-pit. Merely wetting that material from the borrow-pit would not make an impervious dam; it would be tighter when sluiced. When sluic-

(Testimony of Goyne Drummond.)

ing some of it slides down. [162]

My idea of sluicing is to make a compact mass. That would not be accomplished by dumping into water. I would prefer putting the trestle parallel to the core-wall rather than at right angles. Dumping from trestles parallel to the core-wall and then sluicing in towards the core-wall would get your finer materials next to the core-wall; they would be washed from above; there would be an excess of fines next to the core-wall and laying against it. I don't think you could sluice the material in for a distance of 200 feet; you could, but it would be a pretty hard proposition. I did some sluicing up in Wyoming. I did some sluicing in Wyoming by means of a box trough; sluiced in a thickness of a couple of feet. That is the only sluicing I ever did before this.

I think one of the borrow-pits was excavated within 100 feet of the dam and the other one I think was 200 feet. I don't think they were excavated within 20 feet of the embankment unless it was just to start laying the track.

The concrete used in the core-wall was made of gravel and sand, no clay. The gravel we used was all in there and dumped, gotten from a selection in the pit which they were careful not to have any clay stratum in. I never noticed that it was taken in differently from the dump in the fill. It was not screened, not all of it.

Q. Was that according to specification?

A. It was screened and tested.

(Testimony of Goyne Drummond.)

Q. Was that according to specification not to have it screened?

A. I think it was to a certain extent.

The gravel was apparently clean. It was all taken from the reservoir pit, but contained some stones larger than would pass through a 2½ inch ring. [163]

Q. Was that according to specifications?

A. Not especially. We could have screened it. I don't know whether all the concrete was tested for tensile strength. There were tests made. Jones was the man in charge of the dam. I don't remember what tests were made; Jones said he made tests.

I had no means of knowing whether the sheet piling was driven to bedrock; it was driven to refusal. The test I made was a kind of blue shale at various depths, from 10 feet to 30; the piling were 18 feet long and were spliced. I don't know how many were driven 30 feet. I didn't pay any attention to the number of piling driven. I couldn't say whether there was more than 113. They were 6-inch piling, a quarter or ⅜ of an inch thick. I saw piling driven 14 feet. Sometimes they struck boulders. Once I saw that.

Defendants' Exhibit 1 shows about 375 feet of sheet piling. From the end of the sheet piling we constructed a core-wall 6 to 8 feet below the original surface of the ground; that probably extended four or five hundred feet. This plan shows it went in nearly 900 feet. The core-wall did not go down to impervious material. I don't remember whether

(Testimony of Goyne Drummond.)

that is in accordance with the plans and specifications. I don't remember whether I got any instructions not to put the wall down to impervious material. The borrow-pits were excavated about a depth of 20 feet or more. We struck small strata of clay or sediment in various places in the borrow-pits. The core-wall was bonded to the impervious material next to the tunnel or the bluff but not on the other end. To the left of the end of the core-wall we dug a trench 6 to 8 feet deep. That was not bonded to impervious material. I think that was filled with other materials than that from the borrow-pits. I cannot remember whether we got any [164] other material or where we got it from. I think it was sandy loam from the other side of the creek. I don't remember how it was filled or whether it was puddled or whether horses were driven upon it.

Q. But still you have no hesitation in saying that everything was done in accordance with the specifications?

A. Well, now, then, the men whom I had under me I had confidence in while I didn't see this; also a certain amount of confidence in the contractors as I have in most any man, and when I tested that everything was done in accordance with specifications, I am basing my statement partly on the confidence I had in my subordinates.

I think there was a small stratum of clay in the lower borrow-pit, the one next to the reservoir; I am not sure of that. The material with which the trench was back filled was very similar to the borrow-pit material.

(Testimony of Goyne Drummond.)

We put reinforced concrete facing on the upper face of the dam. That was by agreement while Rachboker was there. I know of no written order. That was better than the riprap. The concrete facing 4 inches thick would not necessarily break up. I have seen concrete 8 inches thick on the bottom of a reservoir bed which pressure had raised up about 3 feet and yet it did not crack. The bottom of the reservoir was 200 by 150 feet; the pressure of the water raised the concrete.

I don't know that the bonding of the joints in the core-wall was badly done; I don't know that it cracked so it leaked badly. Work on the dam was stopped by me in August, 1910, on Judge Ruick's orders. I don't know that the State gave orders to stop it; I heard they did, but I have no means of knowing.

When I left the employ of the Big Lost River Irrigation Company I did not take note-books with me; I received a letter [165] from Mr. Storrow that he wanted the stream measurements which were taken. I had a copy of them, but I made no reply to him; I don't know for whom it was being asked, or for what. I had taken a copy for my own information so that I might compare the sinking of that stream with other streams.

Probably two-thirds of the dam was constructed on the cone of Cedar Creek; that was a deposit from Cedar Creek. The waters from the creek sunk into the cone mostly except in extremely high waters. I don't think the material from which the core-wall

(Testimony of Goyne Drummond.)

was made was taken from the upper slope of the dam within 40 feet of the core-wall.

There was probably 5 or 6 second feet of water coming through the core-wall. Mr. Lippincot probably had as good a right to his opinion as I to mine when he said 20 feet. I don't think that Ford, Bacon and Davis are correct in saying that 50 second-feet were coming through. That is a difference in judgment. I don't think the concrete core-wall was being made of earth fill including clay. There was a little water seeping through the core-wall, but not enough to speak of. Not to my knowledge was there a difference of 10 feet in the depth to which two adjacent steel pilings were driven. I think there were 200 feet of sheet piling driven, at least 75 feet or over. When Roberts was there, I don't think that 50 second-feet of water was going through; I didn't measure them. My judgment and the judgment of all of those engineers that there was as much as 50 second-feet going through differed just that much. Over near the cliff Mr. Martin gave me permission to run the core-wall down to the rock instead of using the sheet piling. That was probably 20 feet from the cliff. We ran the core-wall to the rock probably 15 feet.

I don't know the capacity of the pump with which we did the sluicing. [166]

Referring to photograph, Exhibit 16, I think that shows the puddling has been done so as to make it fairly impervious. I cannot tell from photograph, Defendants' Exhibit 18, whether the puddling has

(Testimony of Goyne Drummond.)

it was above the head-gate. The head-gate is about fifteen miles below the reservoir. The reservoir could be used in connection with a part of the canals without the balance; couldn't use the canals much without the reservoir.

Redirect Examination.

Looking at Defendants' Exhibit 14, I should judge about 1000 yards of gravel were dumped diagonally. The rest was dumped from the track where it was curved and parallel. I know Rachbocker's [168] signature. This is it, Plaintiff's Exhibit No. 30. It reads as follows:

Plaintiff's Exhibit No. 30.

"Mackay, Idaho, 6-7-09.

Corey Brothers Construction Company,
Mackay, Idaho.

Gentlemen: Conditions being such that same can be carried out by contractors without additional expense or any delay in work, authority being given engineer to determine same, you are hereby notified that all spoil from tunnel approaches, tunnel bore and spillway excavation, must be deposited within slope stakes of Mackay reservoir dam.

Sincerely yours,

H. B. RASCHBACHER,

Engr., THE ARNOLD COMPANY."

It is stipulated that the residence of defendant Nephi Hansen and Ephriam Hansen, copartners, under the firm name and style of Hansen Brothers, K. L. Molen and R. E. Kutler, copartners, under the firm name and style of Molen & Kutler, J. W. Curd

and N. Foss, copartners under the firm name and style of Curd & Foss, K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen, David Chamberlain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Brothers, Frank Hess, F. L. Pinney, S. H. Walton, are each and all residents and citizens as alleged in the complaint in this case, and that the defendant William Mooney was and is a citizen and resident of the State of Wyoming.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, being recalled, testified as follows:

Plaintiff's Exhibit 31, copy of articles of incorporation of the Corey Bros. Construction Company, certified to by Secretary of State of the State of Idaho.

Plaintiff's Exhibit 32, certificate of the Secretary of State of Idaho to the Corey Bros. Construction Company, permitting it to do business.

Plaintiff's Exhibit 33, copy of articles of incorporation [169] of the Corey Bros. Construction Company, certified by the Recorder of Custer County, showing that said articles were filed in his office on the 20th day of July, 1909.

Plaintiff's Exhibit 34, copy of designation of agent by the Corey Bros. Construction Company.

Mr. HENDERSON.—Q. Is that your signature? (Showing witness paper.) A. Yes, sir.

Q. Would you swear to that? A. Yes, sir.

Said document was thereupon marked Plaintiff's Exhibit No. 35.

(Testimony of W. W. Corey.)

Q. Did you have this lien filed in any of the counties of Idaho? A. Yes, sir.

Q. Where?

A. Custer, Fremont, Blaine, Bingham.

Mr. HENDERSON.—I offer this in evidence, No. 35.

Mr. POWELL.—That is objected to as incompetent, irrelevant and immaterial, for the reason that it does not appear to be a statement of a lien as contemplated by the statutes of the State of Idaho, and is not in the name of the plaintiff in this case, and for all the reasons given heretofore in the offer of the certified copy of the articles of incorporation of "Corey Bros. Construction Co.," it appearing that the instrument is signed by Corey Bros. Construction Co., and not by the plaintiff in this suit, and not by the usual manner in which the plaintiff corporation signs its name, and not in the name of the corporation itself.

Mr. HENDERSON.—Now, gentlemen, that seems to be only filed, that one in the county of—

Mr. POWELL.—Are you offering the filing marks, Judge? [170]

Mr. HENDERSON.—And the filing marks there, and this is in the county of Bingham. Now, I have certified copies of mechanics' liens as filed in the courts in the counties of Blaine, Custer, Bingham and Fremont.

Mr. POWELL.—May we not shorten the record Judge, by agreeing that similar copies were filed at—state when they were filed.

(Testimony of W. W. Corey.)

Mr. HENDERSON.—I will introduce one certified copy and then—I will introduce the one that is filed in Custer County. Here is a certified copy of it.

Said document was thereupon marked Plaintiff's Exhibit No. 36.

Mr. POWELL.—That is objected to for the same reasons as given for Exhibit 35, just above referred to and offered.

Mr. HENDERSON.—It is stipulated that identical notice of lien was filed with the County Recorder of Blaine County on August 20, 1910, and duly recorded in Book 5 of Liens, commencing at page 408; and identical notice was also filed with the County Recorder of Bingham County on the 25th day of August, 1910, and was recorded in Book No. 3 of book of liens; also an identical copy of this lien was filed with the County Recorder of Fremont County on the 23d of August, 1910, and was recorded in Book A of Liens, commencing at page 488 to 499, inclusive.

Mr. POWELL.—While it is admitted that such filings were made, they are all objected to for the same reasons as given to the offer of Exhibit 35.

Mr. HENDERSON.—Q. Mr. Corey, I show you Plaintiff's Exhibit No. 23. Is that your signature?

A. Yes, I signed this. I didn't sign that part.

Q. I am asking if that is your signature?

A. Yes. [171]

Q. Did you sign as president of the Corey Bros. Construction Company? A. I did.

Mr. RUICK.—What does that purport to be, that paper you have?

(Testimony of W. W. Corey.)

Mr. HENDERSON.—The contract entered into between the Big Lost River Irrigation Company and Corey Bros. Construction Company.

Q. I notice on the seal mark here in the rim, "Corey Bros. Con. Co., Incorporated." Is that the way your seal is?

Mr. POWELL.—That is objected to as not being the best evidence. The articles of incorporation describing the seal would be the best evidence.

A. Yes, sir.

Before that contract between the Corey Bros. Construction Company and the Big Lost River Irrigation Company was signed, I was in Boise, after April and in May, 1909; I talked with C. B. Hurtt, Rosecranz, George S. Speer and James Clinton; they wanted me to give them prices for what I would build an irrigation system for the Big Lost River Irrigation Company for; I gave them my prices.

They wanted me to build the whole system. We agreed on prices. About June 15th we commenced moving on. Before I went to work I had a further talk about a contract. I wanted a contract and they were not quite ready. They told me they had taken over some property, there was going to be a reorganization of the company. Before I went to work I received a copy of the proposed contract. Plaintiff's Exhibit 37 is it. It is identical with the one that was signed. Merely the date and the signatures left out in the copy. The typewritten signatures of this Construction Company and Big Lost River Irrigation Company were on when I got [172] that

(Testimony of W. W. Corey.)

copy. There was no change whatsoever in the contract that I was working under from June 15 to August 26, 1909, from which we worked under after August 26, 1909. (Exhibit 37 is identical with Plaintiff's Exhibit 23, except that No. 37 does not contain the signatures.)

We worked from the middle of June, 1909, to the middle of August, 1910, then stopped for the lack of funds. The Big Lost River Irrigation Company had failed to pay me. The president told me they had no funds. We did nearly half the work on the dam and over 90 per cent on the canal. The engineer in charge in the field when we started was H. G. Raschbacher. He was succeeded by Goynes Drummond. We received instructions from them. We did the work according to the contract, plans and specifications, and under the direction of the engineers in charge of the work. I received Plaintiff's Exhibit 38 from the Arnold Company, who were the engineers in charge for the Big Lost River Irrigation Company. It covers the work from the time we started until we finished. Rosecranz was chief engineer of the Big Lost River Irrigation Company. Plaintiff's Exhibit 39 contains all the work we did on Mackay dam, including March, 1910. Exhibit 41 is a certificate of material furnished on the canal. Received it from the Arnold people. There is due now about \$525,000 with interest. Exhibit 40 is for material furnished from June 1st, 1909, to June 30, 1910. We quit work about August 15, 1910.

(Testimony of W. W. Corey.)

Cross-examination.

(By Mr. MILLER.)

Exhibit 37 is in the identical form when given them. The typewritten signatures were on there, the construction company by _____, President. Attest _____ Secretary; Big Lost River Irrigation Company by _____, President. Attest _____, Secretary. I have had that [173] since I received it. We went to work June 15th or a few days later. These prices on this proposal sheet marked with a Roman five were in at the time I got this copy. They are the prices we agreed on. I had already given Rosecranz my prices, called them off to him and he put them down. And from that he doubtless put the prices in the contract. I found the prices correct in the contract. We got this document, Exhibit 37, a little before we started to work—about the first of June. From that time on I was on the work most of the time but was in Boise a few times, also in Ogden a few times. Whenever I was in Boise I think I always saw Mr. Hurtt. Within the two months following June 15, 1909, I was in Boise two or three times. On those occasions I talked with Mr. Hurtt about the work. I was here on August 26, 1909, and was here at Boise two or three times between June 16 and August 26, 1909. Before I got this contract I told them I would go on and do the work. When I got this copy of the contract just before going to work I looked over the copy and found it satisfactory, and before I went to the work I think I told them it was satisfactory. When

(Testimony of W. W. Corey.)

we agreed on the prices and the terms of the contract there were present Hurtt, Rosecranz, Speer, Clinton and myself.

I don't know whether the State Engineer told us to stop work before we did. I was in Chicago at the time. My son wired me. Hadn't been at the scene of the operations for a month or more. Whether the work was stopped by the State I personally do not know. We got an order from the engineer in charge to stop work. When I say work was stopped by reason of the lack of funds, I mean that would have been one good reason. I don't know whether the work on the dam was stopped by the State or not. When we had this conference they told me the Arnold Company would have charge of the engineering and Rosecranz would [174] be the chief engineer of the Big Lost River project. I was general superintendent with headquarters at Mackay. Orson Corey superintended the graders. W. E. Corey had charge of the dam and Archie Corey was the bookkeeper.

I spent my time on the work all the time. I familiarized myself with the terms of the contract and specifications as to the manner in which the work should be done, before I went to work. The amount due me is shown in the estimates.

That includes 10 per cent retained from the time the work was started. We received various payments on the estimates. Our January, 1910, estimate was never paid. Up to that time they were all paid under this contract. We got money directly

(Testimony of W. W. Corey.)

from the Big Lost River Irrigation Company in June, 1910, I think. I don't know on which estimate that was. That was the first we got directly from the Big Lost River Irrigation Company. The money we got in June, 1910, is the first that did not come from Chicago. All that came from Chicago came from Trowbridge & Niver Company. It is not true that they paid us in April, 1910, for all due up to that time. I suppose I received this telegram reading: "Checks mailed to-day, balance for your estimates as furnished by Arnold." Signed by Trowbridge & Niver Company. The January, 1910, estimate has never been paid. I suppose they paid the balance of the March estimate. Each estimate that we got included on its face all prior estimates and gave the balance due. The March estimate did not include all the moneys due. They sent me some notes, but I would not accept them. I sent them back. I put one in the bank for collection, but they could not collect—not as collateral—put that in as credit for the Big Lost River. That was a three or four months note. The other is about a sixty day note. Our bank account was not credited with that note. We held the note until it was about due, and then banked it for collection. Did [175] not bank the other note. Those notes were signed by Trowbridge & Niver Company. Those notes would have been enough to pay the January estimate. We never credited those notes to the account of the Big Lost River Project as requested.

Defendants' Exhibit No. 20 is the letter which we

(Testimony of W. W. Corey.)

wrote Trowbridge & Niver Company regarding these notes.

I couldn't say what was the retained 10 per cent, how much that amounts to for all the money that was paid was paid on these estimates and was all paid under this one contract. It all came from Trowbridge & Niver Company up to June, 1910.

This letter signed by somebody connected with the Arnold Company directing the piling of the excavated rock within the lines of the dam does not conflict with the contract plans and specifications. The Corey Bros. Construction Company has no letters or writings authorizing it in any way to vary in the construction work from the plans, contract and specifications, and never did have so far as I know.

When this contract was agreed upon Speer and Rosecranz were present. It was talked that we were to be paid on monthly estimates. There was no talk on the point of where the money was to come from. I supposed, of course, it would be paid by the Big Lost River Irrigation Company. There was no talk about where they were to get the money.

I think there was no talk between me and Hurtt or between me and Rosecranz and Speer as to where the money was to come from. Nothing was said about a bond issue. The first I ever heard about bonds or collateral was as I remember March 14, when they sent me those notes. That is the first I ever heard of it. Prior to this I knew nothing about a bond issue.

I have been in the contracting business since 1881.

(Testimony of W. W. Corey.)

As a rule I look into the credit of the concern from whom I take [176] a contract for a large amount of money. In this instance I looked up Trowbridge & Niver somewhat, and I knew Mr. Clinton and Mr. Hurtt. I knew Clinton and Hurtt would not be personally responsible for the debt. The reason I looked up their standing was that they wouldn't undertake something that they couldn't pay for. Speer did not say Trowbridge & Niver would guarantee the payment. In looking up Trowbridge & Niver I did not expect they would see the work was paid for. I looked them up to see what kind of people I was dealing with, as Speer was vice-president. I think I sent a telegram dated Ogden, May 16, 1910, addressed to George F. Speer, and signed by W. W. Corey. I think the telegram is true. I guess I would have to correct that telegram because we didn't discount the note.

Letter from Corey Bros. Construction Company to George F. Speer dated October 13, 1909, saying that "We succeeded to-day in getting the Union Portland Cement Company to sign the contract, and have mailed the same to Mr. Hurtt at Boise." We deposited the note in the Utah National Bank of Ogden, put it there for collection. We haven't a bank-book. My business is railroad contracting principally. Pat Daley was my foreman. He has been with us off and on for two or three years. He was a kind of general superintendent under my son.

When we deposited notes for collection we didn't draw against them. We kept that note in our vault

(Testimony of W. W. Corey.)

until we put it in the bank for collection. Put it in the bank perhaps a month before it was due. Didn't put it up as collateral security for a loan. Didn't borrow anything on it. Couldn't have gotten six bits on it. Pat Daley was foreman of the Mackay dam. I constructed one dam in Canada before this. That was the only one of any magnitude. That was about half a mile long and 40 feet high. A dam for a reservoir for irrigation. It was near Calgary. [177] That was for a 30-foot head of water. Had no core-wall. It was made of heavy soil, clay or loam. Built with scrapers and dump wagons. Did not use any railroad track. Didn't puddle or pack except by teams. I have built little small dams here and there, damming a river to turn the channel in railroad construction. Six dams in Idaho on Bear River. Put in six or eight miles to change the stream. Those dams were earth and gravel, 10 or 12 feet high, 100 to 150 feet long, made with scrapers.

Redirect Examination.

(By Mr. HENDERSON.)

Bear River carries about a thousand second-feet when it is normal. Two or three times as large as the Big Lost River.

I was to have these works completed by May 1, 1910. There were two reasons why we did not. First, the company would not comply with their contract in furnishing materials. Second, they did not pay me.

Letter from Corey Bros. Construction Company, to Trowbridge & Niver Company of October 5th,

(Testimony of W. W. Corey.)

about draft for sheet piling offered in evidence, and reads as follows:

“Mackay, Idaho, October 5, 1909.

The Trowbridge & Niver Company,

Chicago, Ill.

Gentlemen:

Some days ago we drew on you for payment of three cars of steel sheet piling which was shipped to us at Mackay, Idaho, with sight draft attached to the B/L, and our Ogden office advise us that you suggest that we have these matters O. Kd by Mr. Speer or the Arnold Company, before drawing on you in the future, and in reply we will say that it is no part of our contract to pay for this piling, or any other structural steel or cement to be used in the construction of the Big Lost River Project, as our contract calls for this material to be delivered to us F. O. B. the nearest R. R. station to the work.”

Recross-examination.

The company failed to furnish structural steel for the [178] outlet of the tunnel, controlling work. They were also delayed in their sheet steel piling. The outlet of the tunnel was completed before May 1, 1910. The sheet steel piling arrived in the fall of 1909, but they were not driven in time. It froze up and we couldn't haul material to the dam. We called for the piling the 10th of July, it came the middle of October. The work was not stopped before May 1st on account of these nonpayments, but we were delayed as we didn't work as fast as if we had more funds. We didn't put on the force we

(Testimony of W. W. Corey.)

would have put on. The work on the dam was delayed on account of the absence of that piling. We were working about 100 men down at the close of the work. The work on the dam was finished pretty close, I think, except one lift before putting in the piling. We couldn't put that in without the piling. Some of the work on the canal was delayed by the absence of the steel.

Redirect Examination.

I think we received letters from some of the engineers directing us to make changes from the specifications. I mean we didn't do any work only what the engineers directed. I received other letters besides the one that has been introduced.

Recross-examination.

(By Mr. MILLER.)

I may have some of those letters here. They may be in the office, I don't know. I may not have them all. I didn't see all of them. I was pretty particular to get my instructions. I say, there may be some other letters besides the one offered.

I don't know of any other letters authorizing changes from the specifications except the one about the excavation from the rock being put into the dam, and the ones concerning the reinforcing of the tunnel. So far as I know these letters are the only ones received. So far as my recollection is now those two [179] letters are all that we ever had. I don't recall any others.

[Testimony of D. Worth Clark, for Plaintiff.]

D. WORTH CLARK testified as follows:

That \$30,000 was reasonable attorneys' fees for plaintiff.

[Testimony of A. T. Corey, for Plaintiff.]

A. T. COREY, a witness for plaintiff, testified:

I am vice-president, secretary-treasurer, director of the Corey Bros. Construction Company. I was the bookkeeper at the time of this work. Exhibits 19 and 20 were received from Goyne Drummond, the engineer in charge of the work. Exhibits 38 to 41 inclusive were received from the Arnold Engineering Company of Chicago. These certificates show the full amount of the work done by Corey Bros. Construction Company. Exhibit 42 is the estimate of work done on the Mackay Reservoir Dam from the beginning to June 30, 1909, by the Corey Bros. Construction Company. Exhibit 43 is an estimate for the work done on the canal up to June 30, 1909. Didn't receive any certificate for materials furnished in June. Force account is included in estimates for excavation.

Here witness identifies exhibits from 42 to 47. Corey Bros. Construction Company has received \$691,119.48.

(Here follows the list of payments received.)

The last payment, \$3,000, was from the Big Lost River Irrigation Company direct. All the rest were from Trowbridge & Niver Company. Amount still due Corey Bros. Construction Company is \$522,884.03, which does not include amount due to Union Portland Cement Company.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, being recalled, testified:

It is my signature on Exhibit 35. [180]

When the contract, Exhibit 23, was delivered to us we had plans and specifications. Not all the blue-prints were delivered to me when we signed the contract. They were delivered in June, 1909.

Recross-examination.

The blue-prints that we had along before August 26th, were those identified by Drummond. We got those June 1st. Got them for the whole works. I knew when I went to work that this was a Carey Act project. I understood the contract was between the State and the Big Lost River Irrigation Company. I had no conference with the State Engineer. Speer did not tell me, that I recollect, that he had a contract with the State. I always understood it was between the Big Lost River Irrigation Company and the State.

Redirect Examination.

When I swore to this mechanic's lien claim I did not have the estimate for August, 1910. [181]

Recross-examination of W. W. COREY.

(By Mr. MILLER.)

When we filed the lien we did not have the final estimate. I do not recollect whether we had the one which has been identified here in evidence marked Plaintiff's Exhibit No. 19 and 20 and signed by Goyne Drummond only. We took the general account, everything that was due us, including the

(Testimony of W. W. Corey.)

cement for which estimates had been furnished us by the Union Portland Cement Company.

[Testimony of A. T. Corey, for Plaintiff.]

Direct Examination of A. T. COREY.

(By Mr. HENDERSON.)

I made up the figures for the mechanic's lien. I think the claim of the Union Portland Cement Co. was taken off the amount, as I remember it now. As I remember we deducted \$13,774.56 from the estimates furnished, but we only had estimates covering work done and material furnished to July 31, 1910, and we made an approximate estimate of the work we thought about what it would amount to for August up to the time of filing this lien. We were merely the agent of the Union Portland Cement Co. When the Big Lost River Irrigation Co. paid us for cement we paid the Portland Co. for the cement which they furnished, but the cement which the Portland Co. furnished and for which the Big Lost River Irrigation Co. did not pay us I did not include in the lien. [182]

Cross-examination of A. T. COREY.

(By Mr. POWELL and Mr. HENDERSON.)

The moneys paid to us by the Big Lost River Irrigation Co. on account of cement were never separated. In making my statement yesterday as to the amount that is now due I made use of the figures as found in Exhibits 38, 39, 40 and 41, and those totals went to make up the totals of the work and material from which I reached my conclusions as to the amount that is now due after crediting the

(Testimony of A. T. Corey.)

amounts of the payments and deducting the cement company's bill and the \$13,000 odd of the cement. There was some cement included in the claim for \$41,149.79 for material, but the balance due the Portland Co. that they filed a lien for we deducted from the amount of the certificate that had been rendered us.

[Testimony of Frank D. Higginbotham, for Plaintiff.]

Direct Examination of FRANK D. HIGGINBOTHAM.

(By Mr. HENDERSON.)

I was in the employ of the Corey Bros. Construction Co. as bookkeeper all of the year 1909 and part of 1910. I quit on the 25th of July, 1910. On September 13, 1909, I made the first deposit of \$85,991.37 paid on account of the Big Lost River Irrigation Co. for work done by Corey Bros. Construction Co. for the Irrigation Co.; on October 14th, 1909, \$75,000; on October 25, \$57,292.82; on November 15th, 1909, \$136,879.02; on December 14th, 1909, \$155,329.85; in 1910, January 15th, \$39,306.04; on April 13th, \$39,489.80; on May 13th, \$5,000; on May 17th, \$375.00. I received all the payments made except three. Including the three payments testified to yesterday, \$691,119.48 has been paid. [183]

[Testimony of Osborne B. Gilson, for Plaintiff.]

Direct Examination of OSBORNE B. GILSON.
(By Mr. HENDERSON.)

I have lived in Ogden for about fifteen years. I

(Testimony of Osborne B. Gilson.)

have been manager of the Union Portland Cement Co. for five years.

A certified copy of the articles of incorporation of the Union Portland Cement Co. and also a certified copy of designation of agent of the Union Portland Cement Co. as certified to by the Secretary of State of Idaho, were then offered in evidence, marked Plaintiff's Exhibit No. 48, over objection of Mr. Haga.

Certificate issued by the Secretary of State of the State of Idaho authorizing the Union Portland Cement Co. to do business in the State of Idaho and certifying that the Cement Co. has duly filed its articles was thereupon offered in evidence and marked Plaintiff's Exhibit No. 49 over objection of Mr. Haga, such certificate being dated August 3, 1908.

Certified copy of the articles of incorporation of the Union Portland Cement Co. by the Recorder of Ada County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 50, over objection of Mr. Haga.

Certified copy of designation of agent and acceptance of provisions of the Constitution of the State of Idaho by the Portland Co. filed with the Recorder of Ada County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit 51 over objection of Mr. Haga.

I am acquainted with the signature of Mr. James Pingree; he was secretary of the Union Portland Cement Co. on the 9th day of August, 1910, and signed the claim of lien for and on behalf of the

(Testimony of Osborne B. Gilson.)

Union Portland Cement Co.

Claim of lien filed by the Portland Cement Co. in the County Recorder's office of Fremont County was then offered in evidence and marked Plaintiff's Exhibit No. 52, over objection of Mr. Haga. [184]

Mr. Pingree, as secretary, signed and swore to the notice of intention to hold and claim a lien of the Union Portland Cement Company.

Claim of the Union Portland Cement Company against the Big Lost River Irrigation Co. notice of intention to hold and claim a lien, filed in the County Recorder's office of Bingham County, Idaho, were then offered in evidence and marked Plaintiff's Exhibit No. 53 over the objection of Mr. Haga.

Notice of intention on behalf of the Union Portland Cement Co. to hold and claim a lien against the Big Lost River Irrigation Co. filed in the County Recorder's office in the County of Blaine, Idaho, signed and sworn to by Mr. Pingree as secretary, was then offered in evidence and marked Plaintiff's Exhibit No. 54 over the objection of Mr. Haga.

Claim of lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the Recorder's office of Custer County, Idaho, signed and sworn to by Mr. Pingree as secretary, was then offered in evidence and marked Plaintiff's Exhibit No. 55 over objection of Mr. Haga.

Certified copy of notice of intention to hold and claim a lien, by the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the records of Fremont County, Idaho, was then

(Testimony of Osborne B. Gilson.)

offered in evidence and marked Plaintiff's Exhibit No. 56 over the objection of Mr. Haga.

Certified copy of notice of intention to hold and claim a lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the County Recorder's office of Custer County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 57 over objection of Mr. Haga.

Certified copy of the notice of intention to hold and claim a lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in the County Recorder's office of Bingham County, Idaho, was then offered in evidence [185] and marked Plaintiff's Exhibit No. 58 over objection of Mr. Haga.

Certified copy of notice of intention to hold and claim a lien of the Union Portland Cement Co. against the Big Lost River Irrigation Co. filed in County Recorder's office of Blaine County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 59 over objection of Mr. Haga.

The Union Portland Cement Co. furnished cement to the Big Lost River Irrigation Co. during the years 1909 and 1910. About the first part of August, 1909, Mr. W. W. Corey came into my office and stated that he received the contract for the work of the Mackay project for the Lost River Irrigation Co. and had been authorized by them to purchase cement; asked me what we would furnish it for. I advised him that we would give him the cement for

(Testimony of Osborne B. Gilson.)

\$2.84 in bulk per barrel, including freight to various points that he would want it to go to, and that according to custom the sacks would be charged for at 10¢ extra to be paid for at the time the cement was paid for, and that a like amount would be deducted when sacks were returned in good condition. He asked about deliveries, and I told him we would be in shape to give him deliveries about any time he wanted them, subject, of course, to such delays as we were not accountable for, strikes, fires, etc., as most contracts cover. He said he was purchasing the cement for the Big Lost River Irrigation Company. Mr. James Pingree as secretary of the Union Portland Cement Co. signed the contract offered in evidence marked Plaintiff's Exhibit No. 24, in my presence, and I witnessed his signature. That contract contains a provision and the agreement that my talk with Mr. Corey did.

There was no change from the contract we had with Mr. Corey for the furnishing of cement different from that contract. We began furnishing cement to the Big Lost River Irrigation Co. the latter part of August, 1909. The Union Portland Cement Co. [186] sent bills to Corey Bros. Construction Co. for the cement that was shipped. (Witness identified a few bills as having been sent to the Corey Bros Construction Co.)

Mr. Corey advised that he was going to act as the representative of the Big Lost River Irrigation Co. and that he had some arrangement regarding the haul and it would be convenient for him to have the

(Testimony of Osborne B. Gilson.)

bills all made out in duplicate. They were sent out from our offices under my direction.

Some of the bills have different prices marked on them on account of the difference in the market price and the price made to Corey Bros., but corrections were afterwards made in these bills and the charge per barrel was \$2.84. I cannot tell offhand how much cement we shipped the Big Lost River Irrigation Co., but it amounted to \$37,406.88. We have been paid \$23,632.32, and there is due \$13,774.56, which has not been paid. We have sent a statement of this amount to the Big Lost River Irrigation Co., the same being identical with statement of account set out in lien attached to complaint in intervention.

Mr. Henderson offered in evidence the statements sent by the Union Portland Cement Co. to Corey Bros. Construction Co. covering all the shipments, which statements had been experted and checked. They were thereupon marked Plaintiff's Exhibit 60.

Mr. Henderson thereupon offered in evidence a summary of the above-mentioned bills which had been checked by witness and was correct. Same was marked Plaintiff's Exhibit No. 61.

Cross-examination of Mr. GILSON.

(By Mr. POWELL.)

The contract marked Exhibit No. 24 was signed by our company on September 18th, 1909.

Car No. 3510 for 212 barrels of cement was shipped on October 8th and this was the first bill in which the cement was billed at \$2.84 per barrel. There was a mistake made in one of [187] the bills

(Testimony of Osborne B. Gilson.)

where the boys billed it at \$3.01, but as appears in the account marked Exhibit No. 62, they received credit for \$74.01, which credit is entered under date of November 15th, 1909. I don't know whether the account was entered in our books under the name of Corey Bros. Construction Co. in connection with the Big Lost River Irrigation Co., or to Corey Bros.

At the request of Corey Bros. all of the cement was billed, shipped and consigned to them. We had no written contract with the Big Lost River Irrigation Co. until Exhibit 24¹ was signed. All the contract we had before that was a verbal contract with Mr. Corey. We had no contract with anybody but Mr. Corey; all the cement was consigned to him and all the payments were made by him. We rendered a bill to the Big Lost River Irrigation Co. for cement when the payments ceased and Mr. Corey said he couldn't get any more money from them. I couldn't give you the date when we rendered a bill to the Irrigation Co., but we rendered monthly statements through Corey Bros. I will find out the date from our office and produce some telegrams regarding this bill.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

Cross-examination of W. W. COREY.

(By Mr. MILLER.)

I did not negotiate the \$25,000 note, nor did I try to raise any money on it as collateral.

I am not sure, but I think we got the contract from

(Testimony of W. W. Corey.)

the Union Portland Cement Co. and in that contract the Cement Co. agreed to furnish cement at \$2.84 per barrel.

**[Testimony of Frank D. Higginbotham, for
Plaintiff (Recalled).]**

Cross-examination of FRANK. D. HIGGIN-
BOTHAM.

(By Mr. POWELL.)

I wrote the letter offered in evidence as Trustee's Exhibit No. 24 and the contract referred to is Plaintiff's Exhibit [188] No. 24. I did not procure them to sign the contract nor was it delivered to me at that time. I wrote that letter at the request of Mr. Corey. I did not see the contract.

Certified copy of lien filed by Corey Bros. Construction Co. against the Big Lost River Irrigation Co. in Blaine County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 62 over objection of Mr. Haga.

Certified copy of a lien of Corey Bros. against the Big Lost River Irrigation Co. filed in Bingham County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 63 over objection of Mr. Haga.

Certified copy of lien of Corey Bros. against the Big Lost River Irrigation Co. filed in Fremont County, Idaho, was then offered in evidence and marked Plaintiff's Exhibit No. 64, over objection of Mr. Powell.

It is admitted that the liens filed by Corey Bros.

Construction Company and by Union Portland Cement Company were filed on the dates set out in their bills of complaint.

[Testimony of C. B. Hurtt, for Plaintiff.]

Direct Examination of C. B. HURTT.

(By Mr. HENDERSON and Mr. MILLER.)

The Big Lost River Irrigation Co. has never made application to the State Board of Land Commissioners of Idaho to apply for patent to the United States for lands under segregation lists No. 8 and 18 and shown by Plaintiff's Exhibits Nos. 1 and 2.

I signed the contract between the Arnold Company and the Big Lost River Irrigation Co. as president. The contract was offered in evidence and marked Plaintiff's Exhibit No. 65. I do not think we had any other contract with the Arnold Co. during this engineering work. Before this contract was signed we had an oral agreement with the Arnold Co. for doing this engineering work on the Big Lost River Irrigation project and this verbal contract was afterwards reduced to writing.

The Arnold Co. did all the engineering work on that project [189] from its inception in June, 1909, to the time we closed down and acted as engineers in preparing the plans before June, 1909.

The files in the case No. 341, Union Portland Cement Co., a Corporation, Plaintiff, and Big Lost River Irrigation Co. et al., Defendants, composed of the bill in equity filed October 22d, the separate answer of the Big Lost River Irrigation Co. to such bill of complaint, filed March 10th, 1911, and the an-

swer of the Continental & Commercial Trust & Savings Bank, formerly the American Trust & Savings Bank, and Frank H. Jones, defendant, were there-upon offered in evidence, but were not marked.

[Testimony of W. E. Corey, for Plaintiff.]

Direct Examination of W. E. COREY.

(By Mr. HENDERSON.)

My name is W. E. Corey. I live at Ogden, Utah. I was connected with the Corey Bros. Construction Co. during the years 1909 and 1910. As I recall, in 1903 the firm name was changed from Corey Bros. and Alden Company to Corey Bros. Construction Company. During the years 1909 and 1910 I was working on the Mackay Dam as superintendent under the direction of W. W. Corey and the engineer for the Big Lost River Irrigation Co. In my judgment we dumped about 1,000 yards of gravel while the trestle was running diagonally across—trestle on the second lift, as shown by Defendants' Exhibit No. 14.

Cross-examination of W. E. COREY.

(By Mr. MILLER.)

Beginning at the right end of the nearest trestle, as shown on Defendant's Trustees' Exhibit No. 14, there was a trestle crossing the river parallel to the core-wall, which is not shown on the picture. At the base of the dam there was a lift of about [190] 20 or 25 feet, and before this picture (Defendants' Trustees' Exhibit No. 14) had been taken there had been a trestle placed below the core-wall to the right

(Testimony of W. E. Corey.)

in this picture crossing the river and dam from that.

Mr. Miller offered in evidence a picture which was marked Defendants' Trustees' Exhibit No. 25.

This last exhibit shows the fill in the first lift and Exhibit No. 14 shows the trestle for the fill on the second lift and the base of the trestle, as shown in Exhibit 14, is resting upon the top of the first lift. Exhibit 25 shows the fill on which the trestle shown in the foreground of Exhibit 14 was afterwards built. Exhibit 25 shows the condition in which the first lift was as it was in the course of construction. Exhibit 25 shows a track running from a point marked "A" on the picture to a point marked "B," the latter being on the lower side of the dam, on the downstream side. A portion of this track was built on a trestle and a portion was not. The track marked on No. 25 extends on up to the first borrow-pit shown in No. 14, where we had a small shovel, a Model 20. It came on down on this track (represented by A & B in No. 25) around, and we put a trestle out this way to the curve in towards the bank and below the core-wall, extending our trestle out and working to the core-wall on a curve from where the shovel was in No. 14 onto a track that is shown in No. 25. This track extended on across to connect with the mountain from B right on across the river and then was dumped into the core-wall, until we quit work. To the best of my recollection there was scarcely anything at all dumped between the core-wall and the upper side of the slope on that track, unless it was

(Testimony of W. E. Corey.)

just to make a grade there. There was no trestle on that side at all. The dumping to the lower side or downstream side of the core-wall from the trestle over to B was done from this track. The track from the core-wall over to B [191] was on a trestle, as I recall. To the best of my recollection the core-wall at the point where this track in No. 25 crossed it was constructed before the track was placed there. We put the concrete in in lifts, the first lift across the river was 5 foot foundations, the next with a 10 foot lift and the next, I think, with an 8 foot lift. If I remember right, now, some place there we put in a 10 foot lift on top of our first 5 foot foundation, and then excavated that trench out again and put in our forms and an 8 foot lift. That is the best of my recollection now. The concrete extended at least 10 feet above the surface of the ground at the time that track was put over there. I don't remember at that point exactly, but if we excavated that channel out we then put a trestle across the trench after putting the concrete in. Exhibit 25 also shows the core-wall and this same track—A—B on 25—crossing the core-wall and a trestle upstream from a parallel to the core-wall. Exhibit 26 shows the condition as it was at one time during the construction of the lower lift. The track marked A—B in 25 and also in 26 is the same track, although we changed its position by throwing it backward and forward to suit the occasion and it may not be in the same position in 26 that it is in No. 25. [192]

A portion of the fill which you see on Exhibit No.

(Testimony of W. E. Corey.)

26 was dumped from the track A-B. A portion of this was dumped from a track that came across on the upper side of the core-wall. This portion of the fill from above the core-wall to "A," may not have been dumped from that track.

Where you draw the dotted line from "A" down to the lower part of the picture is the place where the fill from track A-B connects with a fill evidently dumped from a track in the picture indicated by the dotted line A-C. This track A-B was, at one time, along the line or about the line of A-C.

Part of the fill upstream from the core-wall was dumped from a track in the position of A-C. At about the point of the dotted line running from A-D is where these two fills apparently connect. I think this portion of the fill to the right of the line A-D was dumped from the track A-B, whereas the portion of the fill to the left of the line A-D was dumped from the track A-C. As I stated in my statement before, there was a little bit dumped in here to level up our ground, but there was no particular amount of materials dumped in on this side of the core-wall from the track.

Mr. MILLER.—I offer these two pictures in evidence that have been marked Defendants' Trustees Exhibit No. 25 and No. 26.

Redirect Examination.

(By Mr. HENDERSON.)

Practically every yard of gravel that was used on that dam was dumped from a line of railroad track parallel to the core of the wall except that 1000 yards.

(Testimony of W. E. Corey.)

There might have been a train load or two to level up our dumps, or something of that kind, that was not.

Recross-examination.

(By Mr. MILLER.)

Not all of the fill that is shown on the first trestle in Exhibit No. 14, beginning at the track upstream from the [193] core-wall and parallel to it and extending over to the point on this trestle where the fill ends, was dumped from this trestle. There was a portion of it.

Looking at this trestle which appears in the foreground of this picture, you will notice at the right of the trestle all of the dumping from this trestle appears to come down to the top of the first lift. The fill from there comes down to this other lift below. That shows that over here or on the downstream side of the core-wall where the dumping from this trestle occurred, there had been dumping above the first lift, but this trestle here is going pretty near straight across the fill. This track here that comes across the core-wall was built, the greater portion of it, up to within a few feet of the core-wall on the ground that was put in there from another lift coming parallel to the core-wall before this trestle shown in the foreground of this picture to the north of the core-wall and between the core-wall and this parallel track that shows on the north or upstream side of it, was built. Exhibit No. 16 shows that same track and trestle crossing the core-wall that is shown on Exhibit No. 14.

Mr. Haga, on behalf of the defendants' trustees, is

given leave by the Court to amend the amendments to the answer filed on April 5th.

Order that replication on file stand to the answer as amended.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

Before the Union Portland Cement Company shipped any cement to our company for the Big Lost River Irrigation Company, I had a talk with Mr. Hurtt about getting cement. It was about the last of July or the first of August. Mr. C. B. Hurtt and Mr. Speer and Mr. Rosecrans were present at the time. The question of cement came up and they told me that the arrangement was made for me to make a contract if I could for the cement; to look around and see what I could do to make a contract, subject, of course, to [194] their approval. I talked with Mr. Gilson. The conversation was that I make arrangements or bargain with him for the Big Lost River Irrigation Co. to furnish the cement on the project, for which I had a contract. The cement was shipped in the name of the Corey Bros. Construction Co. That was done because I knew when I wanted it and could handle it better than to try to get somebody else. I would order and have it shipped in our name and billed to us; then we were to send the bill to the Trowbridge & Niver Co. for the Big Lost River

(Testimony of W. W. Corey.)

Irrigation Co. to be paid. We did not get a cent out of it. We just acted as agents between the two. As they paid, we paid the other people. The cement was used for the benefit of the Big Lost River Irrigation Co. on their system.

**[Testimony of Orson O. Corey, for Plaintiff
(Recalled).]**

ORSON O. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

My name is Orson O. Corey. I live in Ogden, Utah; lived there practically all my life; am a member of the corporation of Corey Bros. Construction Co. I am a director, and was a director during the years 1909 and 1910. I worked for the Corey Bros. Construction Co. in the building of certain canals and dams on what is known as the Big Lost River project. In building the canal, we took orders from the engineers of the Big Lost River Irrigation Co. I did the work in accordance with their instructions.

Objection by Mr. Ruick.

Cross-examination.

(By Mr. RUICK.)

When I refer to the engineers of the Big Lost River Irrigation Co., I mean Mr. Drummond, Mr. Huff and Mr. Raschbacher. Mr. Drummond had charge of a number of engineering parties and they cross-sectioned the work and laid it out and told us what they wanted. [195] I understood that Arnold & Co., of Chicago, were employed by the Big

(Testimony of Orson O. Corey.)

Lost River Irrigation Co., and that Drummond and Raschbacher and these others were employed by The Arnold Engineering Co. for the Big Lost River Irrigation Co. I understood that The Arnold Co. had a contract with the Big Lost River Irrigation Co. to do the engineering on that project.

**[Testimony of Osborne B. Gilson, for Plaintiff
(Recalled).]**

OSBORNE B. GILSON, recalled.

Direct Examination.

(By Mr. HENDERSON.)

Telegrams and letters passed between the Union Portland Cement Co. and the Big Lost River Irrigation Co. The papers you hand me are two telegrams sent by our company and one by the Big Lost River Irrigation Co.; one letter from the Big Lost River Irrigation Co.; one letter from our company, and a statement. The one bearing the earliest date is a letter from the Union Portland Cement Co. to the Big Lost River Irrigation Co., Boise, Idaho, dated July 13, 1910. With that letter, I sent a statement of the account. I addressed the letter to the Big Lost River Irrigation Co., Boise, Idaho.

Letter and copy of account offered in evidence. Objected to by Mr. Powell. Said letter and account were pinned together and thereupon marked Plaintiff's Exhibit No. 66.

I received a letter in reply to that one from the Big Lost River Irrigation Co.

Mr. HENDERSON.—We offer that letter in evidence.

(Testimony of Osborne B. Gilson.)

Marked Plaintiff's Exhibit No. 67. Objected to by Mr. Powell.

Letter read into evidence by Mr. Henderson. Objected to by Mr. Powell.

Letter from the Big Lost River Irrigation Co., dated Boise, Idaho, July 16, 1910, addressed to the Union Portland Cement Co., Masonic Building, Ogden, Utah, acknowledging receipt of [196] their letter of the 13th with statement enclosed, stating that they will be unable to send remittance until the fore part of the next week; Mr. Hurtt being in Chicago looking after matters pertaining to the finances of the company; signed by secretary of the Big Lost River Irrigation Company.

I sent some more telegrams to the Big Lost River Irrigation Co.

A copy of telegram offered in evidence and objected to by Mr. Powell on the ground of incompetency.

Telegram thereupon marked Plaintiff's Exhibit No. 68.

I received a reply to that telegram.

Telegram handed to Mr. Powell; offered in evidence; Plaintiff's Exhibit No. 69; objected to by Mr. Powell.

Telegram read in evidence:

(Testimony of Osborne B. Gilson.)

“Boise City, Idaho, July 26th.

Union Portland Cement Co., Ogden, Utah.

All accounts forwarded Chicago. Expect payment very early date.

BIG LOST RIVER IRRIGATION COMPANY.”

On August 1, 1910, we sent a message to the Big Lost River Irrigation Co., at Boise, as follows:

“Your wire 26th. What is the situation now.”

Telegram handed Mr. Powell; offered in evidence; Plaintiff's Exhibit No. 70. Objected to by Mr. Powell.

I am still waiting for an answer to that one.

Cross-examination.

(By Mr. POWELL.)

This statement, Exhibit No. 66, which was enclosed with the letter of July 13th, the earliest item there shown, was April 1st. All the cement furnished prior to that time, I presume had been paid for. That is a correct statement of the account. [197] It was a correct statement of the account at that time. Whether it goes as far as the first shipment, I don't know. It commences with the shipment of April 1, 1910. This statement was sent to show the balance due. It shows some of the items. I don't know whether it shows all of them. That statement would indicate that all cement sold to that time had been paid for. I can examine my books and tell you whether it had all been paid for. I will have to go to the hotel and look them over. That statement was made up under my direction and that showed a bal-

(Testimony of Osborne B. Gilson.)

ance due of \$14,486.44. It was a true statement of the account at that time, and everything prior to that date had been paid. The Corey Bros. Construction Co. advised us that they would pay for all of the cement as they received the money from the Big Lost River Irrigation Co. We had no agreement from them that they would pay for it. We did not look to them for pay at all. We charged it to the Corey Bros. Construction Co. on the books but if we do not realize from the Big Lost River Irrigation Co., we have no agreement by which we can look to Corey Bros. Construction Co. for payment.

Redirect Examination.

(Mr. HENDERSON.)

I shipped that cement pursuant to our contract with the Big Lost River Irrigation Co.

Objected to by Mr. Powell as calling for a conclusion.

**[Testimony of A. T. Corey, for Plaintiff
(Recalled).]**

A. T. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

We received the first carload of cement from the Union Portland Cement Co. on the first or second day of September, 1909. After looking over the data, I will say that the first cement was received at the station on the first of September, [198] 1909, and I paid the freight bill and receipted for it on the second day of September, 1909. The cement was used

(Testimony of A. T. Corey.)

in the construction of the Big Lost River Irrigation Co. project. Not all of the cement that was received from the Union Portland Cement Co., according to these bills, was used on the Big Lost River Irrigation project. All that was billed against them was, but there were, I think, three cars that we paid the Cement Co. for that we used ourselves. We paid for those. The Big Lost River Irrigation Co. did not pay us.

Cross-examination.

(By Mr. POWELL.)

Mr. HENDERSON.—It is agreed that those three cars of cement which were not used in the Big Lost River Irrigation Co. project are in this itemized statement attached to my statement of lien.

Redirect Examination.

(By Mr. HENDERSON.)

I sent the Union Portland Cement Co. the money for those three cars.

Recross-examination.

(By Mr. POWELL.)

That was, I think, in the fall of 1909. The way that was: cement was very hard to get then and we had it coming faster than we needed it, and we spoke to the engineers, and the Masonic Lodge was putting in a foundation there, and we resold it to the Masonic Lodge. We told the engineer about it and as long as he didn't care, it was all right. This statement shows the cement bought from the Union Portland Cement Co. which was billed to the Big Lost River Irrigation

(Testimony of A. T. Corey.)

Co., and the payments received from the Big Lost River Irrigation Co. on account of this cement.

**[Testimony of Osborne B. Gilson, for Plaintiff
(Recalled).]**

OSBORNE B. GILSON, recalled.

Direct Examination.

(By Mr. HENDERSON.)

I heard Mr. Corey state about the three carloads of cement [199] shipped by the Union Portland Cement Co. to Corey Bros. Construction Co. The first time I heard about that was to-day. If these three cars of cement were diverted by Corey Bros. Construction Co., they are contained in my mechanic's lien.

Cross-examination.

(By Mr. POWELL.)

So far as I know, it didn't go into this work at all.

[Testimony of C. B. Hurtt, for Plaintiff (Recalled).]

C. B. HURTT, recalled.

Cross-examination.

(By Mr. POWELL.)

I attached the signature of the Big Lost River Irrigation Co. to Plaintiff's Exhibit No. 24. Looking at Defendants' Trustees' Exhibit No. 24, and Plaintiff's Exhibit No. 24, my recollection is that I signed the contract—Plaintiff's Exhibit No. 24—between the first and 15th of October, 1909. I observed that the price of the cement was to be \$2.84 per barrel. Early in the negotiations, we requested Corey to make the

(Testimony of C. B. Hurtt.)

best arrangements he could for cement. I think the bills for the Portland cement went to Chicago and were included in the estimates of Corey. I recollect distinctly as to one of the bills coming to my office, but as to any more than that, I don't know. We practically paid none of these bills direct from this office. I did not see the cement. I saw some of the bills and we had a contract with them to furnish the cement. I don't think any of the bills were paid from our office. One might have been—I am not positive as to that.

(Mr. MILLER.)

I am still president of the Big Lost River Irrigation Co.; still exercising the duties and privileges of that office and appropriating the emoluments thereof.

The water rights that are sold are in writing. Approximately 62,000 acres of land and water rights were sold under the Big Lost [200] River project—that is, water rights for about 62,000 acres of land. The project is designed to water about 102,000 acres. The aggregate amount of the water rights sold, in dollars and cents, is about \$1,900,000. Practically all the contracts are with the trustees in Chicago, deposited under the terms of the trust deed, to secure the bondholders. Approximately, there are seven or eight hundred individual contracts. Practically no water has been delivered to these purchasers under those contracts. I think last season there was a small acreage received partial water supply during the season. The water was not delivered to such an extent under these contracts so as to put the com-

(Testimony of C. B. Hurtt.)

pany in a position to collect on them. The Irrigation Company, in its present position, is not in a position to secure title to the land from the State under the Speer contract. From the time that the company was organized—that is, from the time it was chartered—and from then on, I was aware that the Corey Bros. Construction Co. was proceeding with the work under this contract which we had with the Big Lost River Irrigation Co. Mr. W. W. Corey, president of Corey Bros. Construction Co., during the month of July, 1909, conferred with me personally, from time to time on the work. The Big Lost River Irrigation Co. was organized for the purpose of taking over the contract that Speer had with the State; Speer's right acquired from the prior company, and for the purpose of proceeding with the contract already agreed upon with the Corey Bros. Construction Co. I do not think that the estimates issued by, or in the name of, the Arnold Co. to the Corey Bros. Construction Co. were ever submitted to me. They were never submitted to any of the officers here to my knowledge, or ever approved by the Big Lost River Irrigation Co. or any of its officers here. Neither I nor the members [201] of the executive committee ever paid any of these estimates. I think the subsidiary company described as the Lost River Water Co., was provided for in the contract between Mr. Speer and the State Land Board. The articles of incorporation of said company, I think, are in the hands of the receiver or in our office. I will look and see if I have them. Our contract with pur-

(Testimony of C. B. Hurtt.)

chasers of water rights provided for their acquiring stock in that company. That company had a capital stock of 100,000 shares of \$1.00 each.

Objection by Mr. Henderson on account of not being the best evidence.

I have a form of this contract with the various purchasers of water rights. I will produce one of these. I think the contracts provided for one share for each acre of water rights purchased. The State of Idaho, through its officers, ordered the work stopped upon that dam, and the work was stopped pursuant to that direction, and that action was taken by the State because the State claimed that the construction was not in accordance with the contract. After the State stopped the work on the dam, I do not think the company was able to dispose of bonds. I do not believe they tried. There has been no work done on the dam excepting what was done by the State—putting in a temporary spillway.

Redirect Examination.

(By Mr. HENDERSON.)

It has been reported that \$200,000 worth of these bonds issued by the Big Lost River Irrigation Co. were converted by Trowbridge & Niver Co. and the company never received any of the proceeds. Our records show that to be the case too. That amount of bonds was delivered to Trowbridge & Niver Co. which they didn't account for. So far as I know, that \$200,000 of [202] bonds has been sold and part of the bonds are represented by the trustees. Several months before the State stopped the work

(Testimony of C. B. Hurtt.)

on this dam, the Big Lost River Irrigation Co. was in financial difficulties.

There were no bonds sold after the Trowbridge & Niver trouble. It became public, my recollection is, February, 1910. First I heard a rumor about the first of January, 1910. The rumor was that they were undertaking more business than they could handle financially. We relied on the Arnold Co. as to the correctness of the estimates issued by them to the Corey Bros. Construction Co. If those estimates had been submitted to us by the Arnold Co., or by the Corey Bros. Construction Co. we would not have known whether they were correct or not. We had to depend upon the Arnold Co.

Objected to by Mr. Powell as being incompetent.

They are the only figures we had to depend on, and they are right so far as the company knows.

Objected to by Mr. Miller.

We have never repudiated them. I do not mean to say we have sold 62,000 acres of land. We have sold 62,000 acres of water rights—that is, water rights to be used on 62,000 acres of land. The records show in the State Engineer's office that all the water rights in the Big Lost River had been appropriated long before the Big Lost River Irrigation Co. went in there—that is, the water at low season.

Objected to by Mr. Ruick.

The object of constructing the dam at Mackay was to store the flood waters of the Big Lost River. If the dam is not completed, the project will never be successful. It will practically be unable to water any

(Testimony of C. B. Hurtt.)

of the lands that have been segregated by the [203] State. Last year, during the season, I think we watered three or four hundred acres. That was only for part of the season. The dry season comes in August. The success of the Big Lost River Irrigation Co. project depends upon building this dam and having this reservoir site.

Recross-examination.

(By Mr. MILLER.)

This dam or some other dam. Our records show that \$200,000 of bonds were delivered by the trustee to Trowbridge & Niver Co., of which they did not make any accounting.

Q. I believe you stated that none of the estimates made by the Arnold Co. have ever been repudiated by the Big Lost River Irrigation Co. It is equally true that none of these estimates have ever been received, approved or recognized by the Big Lost River Irrigation Co.

A. None of those estimates have ever been received at this office.

Redirect Examination.

(By Mr. HENDERSON.)

I did not see any of these estimates until after the Trowbridge & Niver trouble came up, and after I saw them, I did not repudiate them. I have spoken with Mr. Speer and Mr. Niver a number of times since they have had their financial troubles. I don't remember either Mr. Speer or Mr. Niver having told me there was \$200,000 worth of bonds they had sold which they had not accounted for. The records show

(Testimony of C. B. Hurtt.)

that there was \$200,000 worth of bonds for which they made no accounting to the Big Lost River Irrigation Co. We have made a demand on them. We received no reply. We have made a written demand, and to that they did not make any reply. I have seen Mr. Speer in Chicago a number of times; also Mr. Niver, and talked over this matter. As president of the Big Lost River Irrigation Co., I am interested in the \$200,000. The Trowbridge & Niver Co. gave us to understand that we knew the situation well enough to know that they could not pay the amount at that [204] time. They have never accounted to us, but they have tried to account to Mr. Riley of the Bondholders' Committee. Mr. Riley, who represents the Bondholders' Committee down there, has tried to fix it up.

Objected to by Mr. Powell.

I had a talk with reference to the whole situation with Niver and Speer and they stated that, at this time, they could not make a settlement with the Big Lost River Irrigation Co. On several occasions they admitted that they owed the company \$200,000.

Mr. CLINTON.—I make the same stipulation that Mr. Ruick has made on page 203 of the stenographer's transcript. I consent to that for the Big Lost River Irrigation Co. This statement is as to residence of parties defendant.

**[Testimony of Goyne Drummond, for Plaintiff
(Recalled).]**

GOYNE DRUMMOND, recalled.

Direct Examination.

(By Mr. HENDERSON.)

I have been acquainted with William Mooney about six years. During that time, his place of residence has been at Riverton, Wyoming. He was still living there when I came away.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, recalled.

Direct Examination.

(By Mr. HENDERSON.)

During the month of August, 1909, I had, to the best of my recollection, a force of about five hundred men working for the Big Lost River Irrigation Co. It continued about the same throughout the month. They worked during the whole month.

[Testimony of Heber Q. Hale, for Plaintiff.]

HEBER Q. HALE, witness for the plaintiff.

Direct Examination.

(By Mr. HENDERSON.)

My name is Heber Q. Hale. I live in Boise. I have lived here six years. I am chief clerk of the State Board of Land Commissioners of the State of Idaho. I am acquainted with the records and proceedings that have taken place in that board. I am familiar with the proceedings that have taken place in that [205] board between it and what is known

(Testimony of Heber Q. Hale.)

as the Big Lost River Irrigation project. I recognize Plaintiff's Exhibit Nos. 1 and 2 that you show me. Those are the articles of agreement between the Government and the State of Idaho, sometimes known as Segregation Lists No. 8 and No. 18. These are the contracts or what we term articles of agreement, segregating the lands under a particular list to the State of Idaho, embodying the contract as well between the Secretary of the Interior and the State. These are certified copies of the contract on file in my office. Neither the State of Idaho nor the State Land Board has ever made any application for patents for those lands. No patent has ever been granted by the United States to the State of Idaho for those lands.

Q. I show you Plaintiff's Exhibit No. 14 which is a certified copy from your office of the agreement between the State of Idaho and George S. Speer, calling your attention to page 4. This copy refers to Schedule A, hereto attached, which I do not find attached to this certified copy.

A. Schedule A was never filed in my office in connection with this contract, and, for that reason, we gave you no certified copy of it. I do not know of anything in connection with this contract which purports to be in my office designated as Schedule A.

Cross-examination.

(By Mr. MILLER.)

We have certain maps of the Big Lost River Irrigation project and I am not prepared to testify at this time just whether those maps would be con-

(Testimony of Heber Q. Hale.)

sidered as plans and specifications as designated under what Schedule A intends to include. If there has been filed in the State Engineer's office, and approved by the State Engineer, not only blue-print plans, but also detailed specifications [206] of the dam and canal, they might take the place of Schedule A, so far as the files of the Engineer's office are concerned, and I might say further, that his file in reference to the canals and detailed findings of the surveyors and engineers, are more complete than in my office, but I hardly think that the filings in his office could exactly mean to take the place of Schedule A as completing the files in our office. Still, if I understand your question correctly, he may have all the information in his office on file which Schedule A calls for. Unquestionably he has. It is quite customary in our office for these plans and detailed specifications to be filed after the execution of the contract and the filing of that, and when so filed, they are considered a part of the contract. If the plans and specifications required by Schedule A are filed in the Engineer's office and are not filed in our office, they would have the same official effect, filling the requirements of Schedule A, but we would consider our files incomplete to that extent. The custom in our office has been to accept and file, and usually approve, the plans that bear the approval and signature of the State Engineer in reference to canal structure, reservoir and specifications, etc. It is the State Engineer's approval that we act upon.

(Testimony of Heber Q. Hale.)

Redirect Examination.

(By Mr. HENDERSON.)

My opinion is that the plans as first submitted in connection with certain of the projects in this State which have come under my observation, have of necessity been changed and altered a little to meet conditions later on, and consequently have not been strictly followed, or could not be exactly followed, as first outlined. The changes that have been made, if any, have been by the approval and with the consent of the State Board and [207] the State Engineer.

Objected to by Mr. Haga as incompetent and irrelevant and immaterial.

Recross-examination.

(By Mr. HAGA.)

I don't know of any radical changes that have been made without the consent of the State Land Board in connection with the State Engineer's approval.

Mr. MILLER.—After consultation with my associates, we might admit that not in every instance have the plans been followed.

**[Testimony of Osborne B. Gilson, for Plaintiff
(Recalled).]**

OSBORNE B. GILSON, recalled.

Cross-examination.

(By Mr. POWELL.)

I now have the books and accounts of the Union Portland Cement Co. before me. The heading of the ledger shows Corey Bros. Construction Co. are on Sheet 1 and 2; and Big Lost River Irrigation Co.

(Testimony of Osborne B. Gilson.)

and Corey Bros. Construction Co. on page 3. We have no day-book journal. We make the entries on the ledger from our invoices and charge direct. The invoices are always made up under my supervision. I have the bookkeeper here who made those entries. I was not present when the cars were loaded. I don't know personally what went into the cars. The entries on the ledger sheet which I have before me are made up from our sales account. The account book is made up by the shipping clerk at the plant. I was not at the plant when those particular entries were made. The first entry on the ledger sheets of this account on our books, is dated August 26th, on Sheet No. 1 under the name of Corey Bros. Construction Co., Mackay, Idaho. On that sheet appear all the entries down to and including November 27th, and all shipments down to and including November 27, 1909. Up to that time, there was no account in our books against the Big Lost River Irrigation Co., as far as the ledger went. Continued [208] in the same form on our books on Sheet 2, to and including April 26, 1910, and up to that date, there were no entries in our books against the Big Lost River Irrigation Co.

Q. On sheet 3 which you have brought into court, beginning with the items in May, the Big Lost River Irrigation Co. is named. I observe there in the blank for the name you have written, Corey Bros. Construction Co., Ogden, Utah. Above that is written Big Lost River Irrigation Co.

A. I do not know when that later entry, Big Lost

(Testimony of Osborne B. Gilson.)

River Irrigation Co. was put on this particular sheet. Up to May, we have no entries whatever in our books showing charges against the Big Lost River Irrigation Co. I do not wish to part with those sheets, but I will make exact copies of them.

Said ledger sheets were thereupon marked Defendants' Trustees' Exhibits Nos. 27, 28 and 29.

Mr. POWELL.—It is agreed that copies of the originals may be used in the record.

Redirect Examination.

(By Mr. HENDERSON.)

I know why Big Lost River Irrigation Co. was written above the name of Corey Bros. Construction Co. on Exhibit 29. It was done by the direction of our auditor who said that was the system he was putting in of including all the parties interested. We carried the account in the name of Corey Bros. Co. to facilitate the handling of the work in the office, because the bills were rendered that way and the bills of lading were that way, and shipping instructions were shown as Corey Bros.

Mr. POWELL.—Motion to strike out.

[Testimony of P. L. Williams, for Plaintiff.]

P. L. WILLIAMS, witness for plaintiff.

Direct Examination.

(By Mr. HENDERSON.) [209]

My name is Parley Lycurgus Williams. I live in Salt Lake City, and am an attorney at law. I have been practicing attorney something over forty years. Have been admitted into all the State and United

(Testimony of P. L. Williams.)

States courts for Idaho and Utah, and have practiced law in Idaho. I am general attorney for the Oregon Short Line Railroad. I have a general idea of what is involved in the pleadings.

In my opinion, I would consider \$25,000 a minimum charge, and I should say \$30,000 would be a reasonable compensation, of counsel considering the amount of work and labor involved for preparing and filing mechanic's lien in the counties of Custer, Blaine, Bingham and Fremont, in the State of Idaho; also for filing a bill in equity in the United States Circuit Court in and for Idaho, October 15, 1910, for foreclosing said mechanic's lien; also for filing amended bill bringing in new parties, where the amount in controversy is about \$575,000; also in arguing the plea in bar; filing replications to the several answers; demurring to the answer filed by Bondholders' Committee; also bringing case on for hearing; attending trial; introducing evidence, and doing all the other legal work necessary in obtaining a decree of foreclosure and proceeding with the sale of the property and the issuance of certificates and deed.

Objected to by Mr. Powell.

Cross-examination.

(By Mr. POWELL.)

I have practiced law a little over forty years—about forty-two years. I was first engaged in practice of law in Wyoming for three or four years, from the time of the organization of that territory in the spring of '69. I have resided in, and practiced law

(Testimony of P. L. Williams.)

in Salt Lake City forty years. I came there from Wyoming in '71. I have been general counsel for the Oregon Short [210] Line for 15 years. I am doing special work for the railroads. It was a minor part for the first twenty-five years of my practice and, for the last few years, six or eight, has taken practically all of my time. Of course, there is some business of old clients to which I give attention. Of course, it has had a tendency to divert my effort from general practice, and my time is substantially all taken now in the railroad business. For the last eight or 10 years, I have practically withdrawn from the general practice of law. I have had considerable practice in the State of Idaho. I don't recall trying any cases for private clients for the last ten or twelve years. I am pretty well informed as to the usual and customary charges in the State of Idaho. I think they are pretty good chargers up here. I have not had an opportunity to charge any of the citizens of Idaho for the last, say, dozen years in litigation in their business. I did not take into consideration the fact that they were pretty good chargers up here in making my answer. It is rather based on personal experience in Utah and other States in the Federal courts in connection with litigation somewhat similar—receiverships and foreclosures, etc. Most of the foreclosures and receiverships that I refer to were railroad affairs, some involving considerable amounts that were of a different class of subject matter than railroads.

Mr. Powell makes motion to strike out testimony

of witness on account of being incompetent to testify with reference to the subject matter.

**[Testimony of Frank D. Higginbotham, for
Plaintiff (Recalled).]**

FRANK D. HIGGINBOTHAM, recalled.

Cross-examination.

(By Mr. POWELL.)

Certain documents were marked Defendants' Trustees' Exhibits Nos. 30, 31 and 32.

I was bookkeeper for the Corey Bros. Construction Co. during [211] the time of this work on the Mackay dam and canals until July 25, 1910. Trustees' Exhibit No. 30 which you show me is a correct statement according to the books of the Corey Bros. Construction Co. of cement from the Union Portland Cement Co., and payments made by Corey Bros., which was prepared by me from the books of the Corey Bros. Construction Co. Defendants' Trustees' Exhibit No. 31 is a correct statement according to the books of the Corey Bros. Construction Co. of the cement billed to the Big Lost River Irrigation Co. by Corey Bros. Construction Co., for which they received estimates from the Big Lost River Irrigation Co., and payments made to the Corey Bros. Construction Co. by the Big Lost River Irrigation Co. Defendants' Trustees' Exhibit No. 32 was prepared by me and is a true and correct statement according to the books of the Corey Bros. Construction Co. It appears from said statement that 125 barrels under date of September 16, 1909, 225 barrels under date of November 20, 1909 and 212

(Testimony of Frank D. Higginbotham.)

barrels under date of October 16, 1909, were turned over to the Masonic Lodge.

Defendants' Trustees' Exhibits Nos. 30, 31 and 32 offered in evidence; No. 32 only down to the line reading "statement of cement from Ogden Portland Cement Company."

**[Testimony of P. L. Williams, for Plaintiff
(Recalled).]**

P. L. WILLIAMS, recalled.

Direct Examination.

(By Mr. HENDERSON.)

Mr. POWELL.—It is agreed that the testimony heretofore offered as to his qualifications may stand.

I would consider a reasonable attorney's fee for filing mechanic's lien for Union Portland Cement Co. against the Big Lost River Irrigation Co. in the various counties, and filing the bill in the United States Circuit Court to foreclose the mechanic's lien for \$13,774, I would say a moderate fee in that [212] matter would be \$1,000, and a reasonable fee would be, on a sum of that amount, I would say, ten per cent.

Mr. POWELL.—Judge, may my cross-examination of Judge Williams as to the Corey Bros. matter stand as the cross-examination here?

Mr. HENDERSON.—It can.

**[Testimony of W. E. Corey, for Plaintiff
(Recalled).]**

W. E. COREY, recalled.

Cross-examination.

(By Mr. MILLER.)

I don't know whether I stated yesterday that the trestles which we built for the construction of the dam were not of sufficient strength to sustain the strength of loaded cars, and that, for that reason, we built the trestle a part at a time and dumped from the end, but that is the way we built our trestles. That is true as applied to the trestles parallel with the two toes of the dam, as well as the diagonal track. There was one little place in particular that we made an exception to that, to one line crossing over the other, for just the width of the track in between, by making it double strength at that one particular point. Aside from that, the two trestles at the two toes of the dam, and parallel to the core-wall, were built a piece at a time, and we dumped from the end of the constructed trestle until it was filled there, and then extended the trestle again and dumped from the end. The dumping was chiefly at the end of the fill.

Redirect Examination.

(By Mr. HENDERSON.)

As soon as the track was filled, we dumped on the sides towards the core-wall. We did not dump any gravel over the end of the trestle at the end of the dump.

**[Testimony of Goyne Drummond, for Plaintiff
(Recalled).]**

GOYNE DRUMMOND, recalled.

Cross-examination.

(By Mr. MILLER.)

Q. I asked you heretofore about a certain letter you received from [213] Mr. Storrow requesting you to furnish him certain information.

A. I don't remember whether I preserved that letter or not. If it is preserved, it is in my files. I couldn't say whether this is an exact carbon copy or not. I remember his asking for measurements of the streams and the ditches. I cannot remember all that was in the letter, but it was inquiring as to measurements, I remember that.

Mr. MILLER.—I will ask that this document shown witness be marked for identification.

Said document marked Defendants' Trustees' Exhibit No. 33.

I will make a search for that letter and see if I can find it, and hand the same to Mr. Henderson to be presented at the next session.

I think it was just a few days before Christmas, 1909, I received from the Ogden office—I presume it was from the Corey Bros. Construction Company's office, while it had no marks on it that I could know where it came from—I got a turkey, a box of cranberries, a little box in it, and a box of cigars and there was in that package a small bottle of, I think it was Scotch Whiskey. Also on one trip, while coming from down on the Powell tracks, Mr. Corey

(Testimony of Goyne Drummond.)

got on at Arco, I think. Anyway, he came into the car in which I was sitting. He was carrying a shotgun and after a while, he said, "Would you accept a present from me?" I said, "I will, Mr. Corey, under one consideration, that you will in no way take it that I am to receive this for anything that I have done in this work." I says, "As a friend, if you will give it to me in that way, I will take it." Then he presented me with the shotgun. I was asked to come to this hearing by the Corey Bros. Construction Co. I came without a subpoena and, for the [214] last week or ten days, I have been here in daily conference with the officers of the Corey Bros. Construction Co. concerning the matters about which I have testified. I have not been promised any compensation for my time. They stated in a letter to me that they would pay for my time and expenses. There has been no agreement as to the amount.

Redirect Examination.

(By Mr. HENDERSON.)

The shotgun was handed to me in the fall of 1909. I don't remember the month. I was not influenced by the gifts received from the Corey Bros. Construction Co.

Mr. HENDERSON.—We rest, with the exception that if I can find a map of the system, I will introduce it.

Mr. MILLER.—It is stipulated and agreed between the counsel for the respective parties that the defendant's trustees may, at this time, proceed with

the taking of testimony on their behalf, the formal notice of taking same being waived, said defendants however, reserving the right to take further testimony at other times and places.

**[Testimony of Frank Milton Carhart, for Defendants
(Recalled).]**

FRANK MILTON CARHART, recalled on behalf defense.

Direct Examination.

(By Mr. MILLER.)

I have been sworn and have been on the stand before. Plaintiff's Exhibit No. 14 being a certified copy of the agreement between the State of Idaho and George S. Speer, dated May 27, 1909, heretofore offered in evidence. A copy of this contract, I believe, is on file in the State Engineer's office. This contract refers to a Schedule A which is not attached to the certified copy, referred to in the contract as being "specifications hereto attached and made a part of the contract." There are specifications for the construction of the work designated in that contract on [215] file in our office.

Motion to strike out by Mr. Henderson.

Mr. MILLER.—I show you a document which I will ask the reporter to mark Defendants' Trustees' Exhibit No. 34.

Said document was thereupon marked.

A. Defendants' Exhibit No. 34 is a certified copy of the specifications for the construction of the earth dam and controlling works at Mackay reservoir site—the same earth dam and controlling works re-

(Testimony of Frank Milton Carhart.)

ferred to in that contract.

I do not think that there are other specifications on file in our office covering the dam and controlling works referred to in that contract—Plaintiff's Exhibit No. 14. I have made search there for them. I have found no subsequent ones to the date of this contract. There are some on file of a prior date to the date of the Speer contract. They were superseded by these which are here designated as Defendants' Trustees' Exhibit No. 34. These specifications referred to as Defendants' Trustees' Exhibit No. 34 are marked on the cover, June 2, 1909, by the State Engineer. The originals in our office bear the words: "Approved, June 2, 1909, (Signed) James Stephenson, Jr., State Engineer," and the signature there is the signature of James Stephenson, Jr. That is the ordinary way of approving documents of that kind. He was State Engineer at that time. When a contract of the nature of the Speer contract is filed, if any specifications are filed with it, they are very general in terms. The definite specifications are, as a rule, filed subsequently. If no specifications are filed with the contract, I should judge that those specifications subsequently filed performed the office of those described as Schedule A. They are so considered in the State Engineer's office.

Document already identified as Defendants' Trustees' Exhibit No. 34 offered and received in evidence.

[216]

(Testimony of Frank Milton Carhart.)

Cross-examination.

(By Mr. HENDERSON.)

I did not say Defendants' Trustees' Exhibit No. 34, which is the paper I just had in my hand, are the specifications that are referred to as Schedule A in Plaintiff's Exhibit No. 14. I have been nearly four years in the State Engineer's office. I am Chief Carey Act Engineer. If Schedule A mentioned in Plaintiff's Exhibit No. 14 had been filed in my office, I might not know the document as Schedule A. I do not know definitely whether there is on file in our office any paper that is referred to in the Plaintiff's Exhibit No. 14 as Schedule A. I believe there has been filed in our office a map showing the complete system known as the Big Lost River Irrigation Company's system. I would not say that it is all on one map. I think the maps we have filed cover the complete system. We have a project map on file. I do not believe that we have any project map on file in our office that shows this system any better than the map that you show me which is marked "Plaintiff's Exhibit No. 28."

Redirect Examination.

(By Mr. MILLER.)

Mr. RUICK.—Mr. Carhart, was this paper, Defendants' Trustees' Exhibit No. 34, filed in the State Engineer's office pursuant to the provisions of this contract known as the Speer contract?

A. I believe so. I think these specifications were and are recognized by the State Engineer's office as specifications filed under and pursuant to that con-

(Testimony of Frank Milton Carhart.)

tract. I believe the specifications referred to in the contract relative to the construction of the earth dam and controlling works at the Mackay reservoir site, are recognized by the State Engineer's office as the specifications for the dam and controlling works under and pursuant to the Speer contract, and they are the ones that have been [217] recognized and worked under by the State Engineer's office ever since. [218]

[Testimony of Samuel Storrow, for Defendants.]

SAMUEL STORROW, a witness called and sworn on behalf of defendants, upon direct examination testified as follows:

I am an engineer by profession; reside in Los Angeles; been practicing twenty-two years; principally devoted to structures which have to do with water, and a good deal of railroad practice; been practicing principally west of the Rocky Mountains, considerable around Denver also. My hydraulic practice has included city water works; have been either designing or consulting engineer of earth dams over 50 feet high in Idaho, California, Oregon, Arizona and Old Mexico; have been in responsible charge of dams actually built higher than 200 feet, and in charge of designing and advising on construction of dams designed for a height exceeding 300 feet, and to hold water within approximately 10 feet of their crest. I now think of six earthen dams in excess of 100 feet high that I have had to do with, either as construction or consulting engineer. I am now referring to dams actually built or in process

(Testimony of Samuel Storrow.)

of construction, not merely designed.

I was employed by a committee to examine the Mackay dam. I examined the dam in the summer of 1911, June and July; the field examination was from June 26th to July 15th. I went all over the ground and familiarized myself with it; took such maps and drawings as I could find; contract and specification; compared the structure with the plans and specifications; made repeated trips through the entire system from one end to the other of the canal and everywhere; took a large number of photographs; have had experience in photography for thirty years; during the examination or shortly afterwards I wrote a letter to Goyne Drummond at Riverton, Wyoming. This is a copy of the letter. I got no reply.

Letter offered in evidence as Defendants' Trustees' [219] Exhibit No. 33.

Mr. HENDERSON.—I object to it as incompetent and irrelevant to any issue in this action, and it tends to prove nothing whatever, and I make the further objection that all of this testimony that has been offered on behalf of defendants' trustees is irrelevant and immaterial to any issue raised by the pleadings, either by the trustees or by the Big Lost River Irrigation Company, and that it does not lie in the mouth of the trustees to prove whether the dam was constructed in accordance with the specifications or not, for the reason that there is no affirmative relief asked for in the answer of the defendants trustees.

(Testimony of Samuel Storow.)

I examined, in connection with the Mackay dam the contract and specifications between the Big Lost River Irrigation Company and Corey Bros. Construction Company for the construction of dams, etc. This is it, Plaintiff's Exhibit 23.

I found that the material on the ground in the body of the dam had not been placed as provided in the specifications but was dumped at various angles, not always towards the core-wall; sometimes towards it, sometimes away from it. Some of the trestles were in the upper and lower toes and some were not; some were at various angles across the core-wall. I took photographs showing that condition. Defendant's Exhibit 35 shows in the foreground the second lift; from that diagonal trestle in the second lift there were fifteen or eighteen hundred cubic yards dumped—rather more. This photograph also showed dumping from roadbeds where the tracks have left their marks but the rails have been taken up; in the third lift is shown another diagonal roadway parallel to the first one, showing unmistakable evidence that the dumping had been from a similar diagonal [220] track. The reverse side of this picture shows a nearer view of the first diagonal track on the second lift; the dumping from the other diagonal track back of that shown in 35 amounted to several thousand cubic yards.

Exhibit 36 shows a continuation to the right of the same work shown on Exhibit 16; the dump shown on 36 at the extreme right is essentially parallel to the core-wall; all the balance of that lift is at an an-

(Testimony of Samuel Storrow.)

gle to the core-wall, approximately 45 degrees. The effect of building a trestle parallel to the core-wall and dumping from a car at the end of the trestle, then shoving on an empty car and dumping from the next car at the end of the trestle, and so on, is to lay a layer of course boulders along the bottom of the dump extending completely under the dam, making a blind drain, also dumping from the end makes the slope not towards the core-wall, but at right angles thereto, and, therefore, the strata are at right angles to the core-wall. This stratifies the fill with a series of strata horizontal at the base and thence others sloping upwards at right angles to the core-wall. This, in my opinion, prevents any imperviousness.

Exhibit 18 is a view taken along the core-wall from the center of the tract. It shows the material running down against the core-wall, the larger stuff falling directly [221] against it, the fine dragging behind. The reverse side of the picture is a view looking down stream from the lower borrow-pit. It shows the fill of the dam, lying on the cone of Cedar Creek; two-thirds of the dam lies on that cone.

Photographs 25 and 26, taken before I was there, show a fill dumped diagonally to the core-wall and which is not shown in my photograph; that dumping was done essentially at right angles to the core-wall.

By a comparison of measurements which I made on other parts of the structure which I recognize in these photographs 25 and 26, I estimate that the dump made diagonally to the core-wall, as shown in those pictures, exceeds several thousand cubic

(Testimony of Samuel Storrow.)

yards; that is a part of the first lift.

Picture 37 shows the dam from the hill at the right end of the dam; shows three borrow-pits and a temporary spillway and one diagonal track at the second lift, and two diagonal tracks at the first lift, back of the first.

I found very heavy leakage through the dam and some through the core-wall. The bottom of all dumps throughout the dam were composed of coarse material; in all places where the core-wall was exposed the material next to it was coarse, full of boulders, either not puddled or puddled so slightly as to leave crevices, those near the core-wall not more than half closed and sometimes not closed at all. The [222] borrow-pit was excavated so near the dam as to present an opportunity for the face of the dam to slide into the pit. At the right end of the dam next to the limestone cliff the material from the tunnel and spillway was thrown into the dam; there were large boulders there partially buried. The dam was built on top of the spillway out of the excavations. The concrete face of the dam, as far as built was a concrete of an uneven texture; some was well mixed; other parts not; the concrete was porous and broke very readily; some parts of the core-wall were in plain sight; no evidence of bonding, except when they got through building one piece came back by and by and built another. There were frequent crevices in which I could stick a knife blade, where the new work joined the old; the necessary effect was a very leaky core-wall.

(Testimony of Samuel Storrow.)

The borrow-pit nearest the river was, I should say, 10 feet from the upper toe; the other two borrow-pits showed excavations within 50 feet; the greatest depth of the borrow-pit was as much as 20 feet.

The material of the borrow-pits I examined with great care; it was rather coarse gravel, containing finer and finer gravel until the finest was powder; it was the most uniform line of borrow-pits I have ever seen; it would not be called stratified, though there were little markings or [223] lines. I discovered no hardpan stratum of any kind; I tried very hard to find it because it had been reported to me that such was there; the borrow-pits were of very uniform material as far as excavated.

The object of puddling is to get finer material from one part of the work and added to another part, to render the latter impervious to water. If the dumping is done from trestles parallel to the core-wall, always toward it, and the fill is puddled by a stream of water of the right quantity, the fine material is washed from the bank where dumped, down the slope until it meets the core-wall where it will form a pool. You will obtain a graded fill of fine stuff washed from the bank down against the core-wall where it will fill the crevices.

Part of this fill was dumped directly away from the core-wall. If this dumping had been done pursuant to specifications there was enough fine material in the borrow-pits to have made an impervious bank against the core-wall.

(Testimony of Samuel Storrow.)

Assuming that the rock excavation from the cliff was placed within 20 feet of the core-wall, unless the subsequent puddling were extraordinarily well done open work would be left. I wish to modify one answer. I saw to my mind unmistakable evidence of the excavation from the cliff being deposited 12 to 15 feet from the core-wall; that is, I recognized the rock as being the same rock as that in the [224] spillway, and I saw no evidence of its having come from anywhere else; therefore, I assumed the rock I saw came from the spillway; I saw coarse rock 10 or 12 feet from the core-wall.

If material is dumped from a trestle crossing the core-wall at an angle of 90 or 45 degrees an impervious bank against the core-wall could not be obtained by any amount of puddling. By puddling fine material is moved horizontally. If you dump from a track over the core-wall and deposit the material there dry, and then undertake to puddle you have no place from which to get your fines to add to that near the core-wall, and even if you can get a few fines from somewhere else you cannot get them into the fill just made; it won't penetrate; you cannot bring any foreign material to add to that material dumped directly against the core-wall; the only way that you could now treat the fill so as to get an impervious bank of material against each side of the core-wall, would be to take it all out and put it back again.

The effect of these blind drains that I have described running both horizontally and vertically through the dam, would be to saturate the dam when

(Testimony of Samuel Storow.)

the reservoir was full, and the water would run out on the lower side, causing that side to slough off and make a flatter angle by [225] sliding down; the slide would work backwards step by step, and when the critical stage was reached, the dam being saturated, it would break and be destroyed. A dam so constructed, completed to a height of 120 feet would not in my opinion sustain a height of water of 100 feet; a breach would occur in the dam and the water in the reservoir would tear it to pieces.

I found a record of 113 pieces of sheet piling 6 inches wide. I had two test-pits made, one on each side of the wall beyond the sheet piling, those pits being 20 to 23 feet below the virgin surface of the ground; the wall did not extend to hard-pan, or other impervious material in the places I examined; the water leaked under the wall. I did not investigate the depth of the back filled trench at the left of the core-wall; it was buried when I was there.

The cone of Cedar Creek was of the same material as the borrow-pits; I dug pits in it from 20 to 25 feet deep; it was the same material throughout the depth. Next to an absolute test of a pit in the body of the dam I consider the gravel pits almost indisputable evidence of the composition of the earth underlying the dam.

The borrow-pits were in the cone at Cedar Creek. If we have a head of 100 feet of water in the dam, the latter being built on the cone of Cedar Creek, with a core-wall [226] extending only 6 or 8 feet below the original surface in the cone, and the back

(Testimony of Samuel Storrow.)

filled trench to the same depth, there would, in my opinion, be a very serious leakage under the fill; that would unquestionably affect the amount of water in the reservoir and undoubtedly cause the wreck of the dam; the reservoir would never fill up 100 feet unless it came mighty quick; if it came that quick the strain on the dam would be greater than if it filled slowly. I am sure it would fail if filled quickly, and I am also sure it would fail if filled slowly; if it were possible to get a head of 100 feet it would leak out quite rapidly, but it would wreck the dam before it leaked out; the dam itself would be saturated as well as the ground underneath, and saturated material with a pressure behind it is almost certain to float; that would lessen its effective weight.

The essential elements of an effective dam are a sufficiently water-tight structure on a sufficiently water-tight foundation, with weight to resist the pressure.

Where the dam is designed with a core-wall in the middle, with puddled material beside it, the office of the core-wall and puddle portion is to connect the body of the dam with the substantially impervious material below thereby forming the impervious portion of the fill; the balance of the fill is for weight and strength to resist the thrust. [227]

Besides the lack of imperviousness I saw the slope of the material as dumped, which also showed lack of sufficient puddling. I particularly examined the slopes which extended near or against the wall;

(Testimony of Samuel Storrow.)

if the material is merely dumped from the cars it would have a natural angle of repose; if puddled this angle would flatten out very much; if the angle of the dumped material is at or near the natural angle of repose, that is conclusive evidence that there has not been sufficient puddling.

I had no opportunity to observe whether or not the natural surface of the ground under the dam had been plowed except by photographs taken by the State Engineering Department and by the Arnold Engineering Company.

On the three photographs handed me I recognize places of virgin ground.

(These photographs are marked Exhibits 38, 39, 40, 41.)

To remove the central portion of the dam and replace the material by a puddling process in accordance with the specifications is not practicable; the expense would be too great. I have made estimates as to what it would cost to take this dam on this site and make a satisfactory dam of it, varying from the specifications so as to hold a 100-feet head of water; it would cost over \$600,000, assuming that [228] State Engineer did not require any more expensive work than called for by the specifications on file; if the State Engineer would leave me alone and call for no additional requirements I could build it as good as called for by the specification for \$600,000; that expense would be about the same or a little less than the cost of building a satisfactory dam on this site from the beginning.

(Testimony of Samuel Storow.)

I found that the spillway headed in a tunnel; that did not accord with the specifications; the tunnel is not as effective for a spillway as an open cut with sides approximately the height of the tunnel, because, first, if the water rises a little higher than the crown of the tunnel, its area does not increase; since the dam is almost invariably built higher than called for by the design to allow for settlement, it is always a fact that a cut can take off more water than a tunnel; second, the cut is much less likely to be clogged with debris; there is no doubt about that at all.

The friction in an open cut is about three-quarters of the friction in a tunnel.

I found the construction of the Antelope Creek crossings of the Blaine Canal very different from the plans and specifications; the latter called for four openings in the walls which would permit the floods of the creek to enter the canal whether or not any one was present, because [229] the openings were designed to stand open, never closed, and without gates, the lower edge being at the high-water line of the canal, so that if water came down the creek in a flood and could not otherwise escape, it would go through the openings into the canal; whereas, the water in the canal, if not above its natural high level, would not go into the creek.

The drawings also showed two other additional openings besides those four, connected with culverts or pipes under the canal to take care of the ordinary flow. These were to be controlled by gates, closing

(Testimony of Samuel Storrow.)

which the waters of the creek would rise into the canal. On the ground I found no openings above the high-water line of the canal, and instead of two there were four openings under the canal; and instead of a solid wall for the side of the canal two openings were introduced going to the bottom of the canal and bearing no relation to the purpose or method of the opening shown in the drawing. Those openings would have to be closed to have water in the canal; they would have to be open to take care of the flood water; and then they would not do it unless the water in the canal was less than that in the creek. The four openings upon the drawings designed to be above the water of the canal were 6 by 6 feet; the effectiveness of this structure was entirely destroyed; it was [230] essential that it should be built to accommodate itself to the varying flow of Antelope Creek, which was known to vary suddenly; it was necessary that the structure should be automatic because it is hard to get at. The result of this construction is that the structure was wrecked at the Antelope crossing; that would be the natural effect and what one would expect.

The heads of all the drops in the canal had clear openings; no piers except one which had two; the drawings show that all those heads should have four piers; they are designed to support flash boards, or temporary or even permanent gates; this is to keep the water in the canal, to keep it better soaked up and make greater convenience in regulation; sometimes to raise it sufficiently to get water out of the

(Testimony of Samuel Storrow.)

lateral gates, and then as a matter of emergency to shut off the flow from the canal to repair. Such a device is absolutely necessary; for an irrigation canal it is frequently necessary to build new head-gates to take water out of the new place; and accidents occur which require repair and then the water must be held back; also the water must be kept at a certain depth so as to flow out at laterals, and to prevent the burrowing by animals which, if the canal went dry, would be disastrous.

It would cost \$100,000 to rebuild defective concrete [231] on the drops in canals; half of that would be for putting in those piers.

I examined the head work of the Blaine Canal; Exhibit 6 is the drawing for that; the structure does not accord with the drawings; the spillway intended to pass the floods is 125 instead of 150 feet; also, a wall shown as 7 feet high and 100 feet long from the intake towards the river separating the weir from the head-gates is missing; in place of it is the Darlington head-gate; also a mudway or gateway is built on the wrong side of the river farthest from the head-gates; that 125 foot weir is not sufficient for the floods; if the floods jump the bank they would wreck the structure; the 100-foot wall was designed to keep the flood far away from the head-gate so that if a break occurred from excessive water it would not take out the concrete work, which is very expensive; there is much greater danger of wrecking the Blaine head-gates than if the 100-foot wall were there.

(Testimony of Samuel Storrow.)

The object of the sluiceway or gate is to get rid of mud, ice debris, etc., and keep the channel scoured out in front of the gates; the bottom of the gateway into the Blaine Canal is materially lower than the crest of the spillway; therefore, it is necessary to have this mud-gate; the gate on the other side of the river, so far as getting rid of mud [232] and debris, etc., has no use; it is too far away; it would tend to make quiet water where we don't want it; its effect is the opposite of what it should be.

Having the head-gates of the Darlington Canal adjacent to the Blaine head-gates is an element of weakness; it is not as strong as a concrete wall; it makes a current of water alongside of an important structure; it is a very great defect and adds an element of danger, whereas a high wall would be a great additional safety.

Exhibit 10 shows the bifurcation of the Blaine Canal; it does not accord with the plans; the gateways from the Blaine Canal and Blaine stub leading to the river should be 6 feet by 9 feet 1 inch, unobstructed by concrete; whereas it was built with a curtain of solid concrete closing half the opening, thereby effectively reducing the waterway and changing its use. According to the design gates should have been dropped into the waterway which filled the canal to high-water line and left openings above; this applies to both gates—the one leading to the Era Canal and to the stub; with that construction, if a great amount of water flowed suddenly it would automatically pass over the gates without damage; as

(Testimony of Samuel Storrow.)

now constructed the wooden gates fill the openings so that in case of flood the water could not escape without breaking the structure. [233]

When I was there I found this structure seriously wrecked; Exhibit 42 shows it; picture 43 shows the canal side of those works; the water is shown covering about half of the wooden gate; according to the drawings there were to be no curtain walls above those wooden gates; Exhibit 42 shows the wreck of the stub. I satisfied myself that the wreck was caused by the water breaking over the wall of the Blaine Canal, due entirely to the presence of the curtain walls.

Exhibit 44 shows right back of the Big Lost River where the dam abuts against the limestone cliff; it shows the pools of water where the leakage occurred. I took all the photographs except the four which were shown with reference to the virgin surface of the ground, and the two marked 25 and 26; they accurately represent the conditions at that time.

Cross-examination.

I am forty-seven years of age; I graduated from both Harvard University and Massachusetts Institute of Technology; lived in the west twenty-seven years; now live in California; have lived in Washington, Idaho, and Colorado; never established a legal residence in Idaho; have been here a total of several months. My duty has usually been to see [234] that the work was in conformity with the plans, and, if not, to make a fuss. I cannot tell what Drummond's position was from what he said; I have occu-

(Testimony of Samuel Storrow.)

pied either his or a higher position in every case; I understand he was not permitted any initiative; he would come under the general title of resident engineer to carry out the design made by somebody else; I have been resident engineer many times; in Yakima and Colorado and in California a great many times; while so acting I have quite often changed the work; my authority to make this was always in writing.

Q. Occupying the position that Mr. Drummond did on this work, if he saw that a change would be beneficial to the project and submitted it to his superior, and his superior approved of it, then would Mr. Drummond have authority to direct the contractor who was doing the work to make those changes?

Mr. POWELL.—That is incompetent, and calls for a conclusion on a matter on which the witness has not qualified as an expert. It would be only a conclusion of law.

Mr. RUICK.—Also assuming a state of facts not in evidence.

A. Taking the exhibits in this case as shown,—and I cannot disabuse my mind of their existence—I should say unqualifiedly that Mr. Drummond had no right whatever to vary from an order to Mr. Corey, no matter how the order was given to him.

Q. I am not asking you to draw conclusions, Mr. Storrow. A. I thought you were.

Q. Will you please answer my question now?

A. Will you read the question, please.

(Last question read.)

Mr. MILLER.—I wish to object to that further

(Testimony of Samuel Storrow.)

as not an expert engineering question but as a legal question.

A. I have got to give an opinion. [235]

Mr. HENDERSON.—You can answer that question yes or no.

A. No, sir, I cannot. My nearest answer would be no, but that is not exactly explanatory, nor is it my full answer, nor do I consider it a proper answer; it would be misleading, whether I answer it yes or no, utterly misleading.

I have known Harrison B. Riley for a year; I have the letter of employment and will produce it; he employed me to take a set of plans of reorganization which they had drawn up, a financial scheme of reorganization of the Big Lost River project, to examine the structures at Mackay, get any other information I could, and advise them whether that plan of financial reorganization could be carried out with the amount of funds which they thought they could get; I had the great mass of the plans of the Arnold Company; I had some of them on the ground.

I decided that the dam as it stood could not be completed on those plans, drawings and specifications I examined the plans and specifications prepared by the Arnold Company; after I got on the ground with those plans and specifications I found that a safe dam could have been constructed according to those plans and specifications, emphatically. The plans call for a core-wall to an impervious strata; it was not so built at any of the places where I examined; the two pits I dug were somewhere near

(Testimony of Samuel Storow.)

station 13 plus 50. I found that the characteristics of the cone on which the core-wall was built were similar to the material in the gravel pits; the pits were dug 20 to 25 feet; I don't know how far below the core-wall; the core-wall as built is not sufficient in my opinion; I don't know whether I said anything about that to Mr. Riley; it was not material to my report which was made for a different purpose. I made a verbal report to Mr. Riley prior to my written report; I may have put some facts in the verbal report that I did not incorporate in the written report, [236] being about a month apart. In my written report I made it clear that it was impossible to use the core-wall and the work around it and I told Mr. Riley that those specific things which you say he asked for could not be done. Mr. Riley did not specifically ask me whether the dam could be completed so it would be safe; his questions were, could I take a certain amount of money and carry out a certain scheme; my reply was, "No," and in the process I said the dam could not be continued in his scheme; my written report was very long; I have the report here.

Q. In your written report you made the intention clear, didn't you? A. I tried to.

Q. And you told Mr. Riley in that written report that the work that had been done there was absolutely useless?

A. I do not remember those words. I told him it was useless for the purpose of carrying out the scheme which he asked me to attempt to carry out.

(Testimony of Samuel Storrow.)

Q. Well, didn't Mr. Riley ask you whether certain things couldn't be done to the dam that was already partially erected so as to raise it up and make it a complete dam? A. Yes, sir.

Q. What did you tell him?

A. I told him that those specific things which you say he asked for could not be done.

Q. Then, I understand from you that you made a written report to Mr. Riley that this dam could not be completed so that it would be safe?

A. Is that a question?

Q. Yes, you can answer that yes or no.

A. I do not remember. That question is too much—

Q. Will you look over your report? You have it in [237] court, haven't you?

A. That question is different in form from the way in which Mr. Riley's question came to me, and therefore I cannot answer it yes or no. Mr. Riley's questions were, could I take a certain fixed amount of money and carry out a certain fixed scheme. My reply was that I could not, and in the process of that reply I replied that the dam could not be continued into his scheme, could not be used as part of his scheme, and completed.

Q. Is that report in writing?

A. It probably is in the report—I don't know; it certainly was in the verbal report.

Q. You have got that report right here?

A. It is a very long report.

Q. Will you answer one of my questions directly?

(Testimony of Samuel Storrows.)

Have you got that report here? A. Yes, sir.

Q. Have you got that report here?

A. Yes, sir.

Q. Will you let me look at it?

A. No, sir.

Q. Why won't you let me look at it?

A. Because it was written for a client, and contains matters entirely distinct from construction, and matters of finance and credit, concerning a certain financial scheme to be carried out, matters which I do not consider in any way pertinent to this case, and all strictly confidential.

Q. Will you look at that report then and find out whether you made any report to Mr. Riley whether this dam as partially completed could be completed and used as a dam?

A. I can answer your question sufficiently without looking at the report by saying that I reported to Mr. Riley that this [238] dam could not be completed as it then stood and be a safe dam within the amount of money which he felt we could raise for the project, not that it couldn't be theoretically done, but merely that, with the amount of money on hand, it couldn't be done, and with that understanding I answer your question that I condemned the dam as incapable of being finished.

[Testimony of Paul S. Roberts, for Defendants.]

PAUL S. ROBERTS, a witness duly called and sworn on behalf of the defendants, testified as follows:

Direct Examination.

(By Mr. MILLER.)

I have been civil engineer for seven years; graduated from the University of Michigan in class of 1906, engineering department, and had practiced engineering before then. I am now deputy under the Water Commission of the Second District of Idaho. In April, 1910, I was Carey Act Inspector; appointed by D. G. Martin, State Engineer, in April, 1910. He took office in the fall of 1909. While holding that position I had supervision for the State Engineer of the Mackay dam, from the latter part of April, 1910, until the spring of 1911, when I left that department. My duties were simply to overlook the construction of the work and report to the State Engineer, having familiarized myself with the specifications and plans on file for the dam, approved by the State Engineer's office, and report whether the work was done pursuant to those plans and specifications. I did investigate the dam during its progress; some of the structures had been completed when I went on the work and the dam was partly completed. I observed that the dumping from trestles varied from the specifications in some instances; there was one diagonal cross trestle crossing the core-wall built during my time; I took photographs for the purpose of illustrating the variations from the specifications, to

(Testimony of Paul S. Roberts.)

illuminate my reports. I photographed that diagonal trestle [239] built while I was there; it is shown by photograph marked 41; it shows the first train of cars dumped from that trestle; that was dumped diagonal to the core-wall; I notified the State Engineer, and that that was in conflict with the plans and specifications; I also notified the engineer of the dam, Mr. Jones, to the same effect and requested that he discontinue the use of the trestle for that purpose; he agreed to do so temporarily, but he afterwards resumed without permission from the State Engineer's office.

I made a rough estimate with my eye as to the amount of dumping in the dam from tracks diagonally crossing the core-wall that I saw, and it would exceed 10,000 yards.

Photograph 38 was taken by me; it shows the section of the dam looking over the core-wall; also a part of the reservoir; one trestle in the lower toe and the lower borrow-pit; this photograph was taken in May or June, 1910; Photograph 41 was taken in July, 1910.

(Photographs taken by Roberts from 46 to 65, inclusive.)

45 shows dumpings from a trestle in the lower toe; the dump is in the natural angle at the toe; 65 shows an uncompleted trestle crossing the dam diagonally; the angle of the slide is about 45 degrees; Exhibit 50 shows a train of cars dumping from a track parallel with the core-wall, towards it; the different parts of the core-wall [240] were bonded very well, those

(Testimony of Paul S. Roberts.)

that I saw; the water was coming through in various places due to the coarser materials of the concrete having gathered and the finer material not having filled the joints.

The effect of the dumping from diagonal tracks was that the slide was sometimes away from the core-wall and at other times towards it. The dumping from the high trestle resulted in almost perfect separation of material—the heavier to the bottom; that made a very good passage for water through the embankment; the puddling being done there was not sufficient; it was quite a fair sized stream for ordinary sprinkling; it did not materially affect the slope of the embankment; I reported that the puddling was insufficient.

Picture 62 shows the lower side of the core-wall and the water coming through from the reservoir above the dam; it came through the fill of the dam before it reached the core-wall, a distance of about 200 feet; there was a head of 4 or 5 feet in the reservoir then; at that time there were 10 second feet going through.

For the concrete they were using the gravel and sand as it came from the pits; took it out of the dump; picture 59 shows that.

Picture 54 shows the stream used for puddling as it [241] was when I saw it. Picture 63 is a view of the outlet tunnel for controlling works and of the supply tunnel through the rock, built with steel pipe covered with a foot of concrete; the foundation is supposed to be solid rock from the specifications;

(Testimony of Paul S. Roberts.)

good construction required it; it would not be a good job without; when I was there there was always more or less vibration, depending upon the flow; that led me to suspect poor foundation; I spoke to Drummond and he said it was founded on solid rock; but afterwards the water washing through the valves cut out below the bottom of the cutoff wall, and showed that the wall was not on solid rock, but on slide rock from the cliff; picture 64 shows that.

Under the trestle which crossed the dam on the diagonal the ground beneath the fill was not plowed just previous to dumping; it was very smooth; I saw grass, indicating virgin soil.

Picture 39 shows it at the left; the rock excavated from the cliff showed in the body of dam within 25 feet of the core-wall.

Picture 60 shows the larger rock which separated from the fine and went to the bottom; that large, coarse material is 6 or 8 feet from the core-wall.
[242]

The rock excavated from the cliff was deposited in the body of the dam within 25 feet of the core-wall. Picture No. 60 shows the coarse material within 6 or 8 feet of the core-wall. The spillway is not an open cut as shown on the plans but a tunnel. Picture 55 is a view of the reservoir. The sage brush and debris was not removed from the bottom. Picture 56 shows a portion of the reservoir above the toe of the dam. The debris clogged up the opening of the tunnel and they had to jerk out the grating. The specifications called for riprap on the upper face. The upper face

(Testimony of Paul S. Roberts.)

was not tamped. It was dressed to slope with hand shovels. Without this tamping as soon as you get water on the face you get a settlement which will cause the concrete to crack.

Picture 49 shows the downstream side of the head-gates of the Blaine Canal. The gates are steel and all but one in place. Picture 48 shows the lower side of the Blaine stub of the bifurcation works before it was wrecked. Picture 47 shows the headworks on the Blaine stub and on the Era Canal and the curtain walls. Picture 46 shows drop No. 9 on the Blaine. Martin, State Engineer, is in the picture. He kicked some of the concrete out with his heel. It had been in place two months or more. These various photographs correctly represent the situations at that time.

As the result of my findings and report, Martin notified me to request the engineers in charge to voluntarily close down on the following Saturday and if they refused, I was to notify Martin and he would take other measures. Pursuant to the telegram I requested the work to be stopped.

On the upper face of the dam the ground did settle and there was decided cracking of the concrete. I reported the tunnel instead of the open cut for the spillway; that was almost completed before I went there; therefore I made no objection.

At one time I reported that the seepage through the [243] embankment of the dam was 50 second feet on June third, when there was only a few feet of water in the reservoir. That was correct. On July 6th I requested that the dumping from the diagonal

(Testimony of Paul S. Roberts.)

fill be stopped. It was resumed on the 14th.

On July 30th I reported that the contractor was not plowing the virgin surface of the ground prior to filling at the bottom; also that the supply of water was wholly inadequate to cause proper puddling of the wetted zone; also that Film 7, Roll 3, shows that the embankment was not puddled, though within the "puddled" zone; also that the puddling was not sufficient to stop the flow of water through the embankment as shown by the stream on the photograph; also reported on the same date that on account of the length of the slope the stream of water used for puddling is too small to give any puddled condition at the foot of the slope.

November 14, 1910, I reported water flowing under the core-wall five cubic feet per second in one well-defined channel, then turning at right angles and flowing parallel to the wall beneath the gravel, coming out of the lower side of the wall. The water issuing from the lower side has sufficient force to agitate the gravel in the bottom of the spring so violently that the noise can be heard by one standing on the core-wall above the spring; that the passage of the water underneath was shown by putting coloring material above which came out below the wall two and a half minutes later. I reported the sheet piling did not extend to an impervious stratum, that under a head of only seven and a half feet the water found a channel beneath the core-wall, that a greater head of water would cause serious damage.

The conditions were correctly stated. (Telegram

(Testimony of Paul S. Roberts.)

of Martin offered in evidence, also letter of July 22, 1910, by Martin to Roberts; also the resolution of the State Land Board [244] reciting that the Construction Company constructing the dam is not complying with the specifications of the contract with the State; that the company has failed to comply with the numerous requests to correct the work, and ordering the work to be discontinued until constructed in accordance with the contract and that no further sale of water rights be made.

Cross-examination.

My reports were made to the State Engineer and became public files. I am now 31 years of age. I was five years in the Michigan University. I took five years to do the course because of absences in actual practice. The first irrigation project I was on was in the fall of 1908 in Blaine County, Idaho, as engineer on construction. I was the only engineer. There were about 50 miles of canal and 15,000 acres. Half the system was built before I went there. I built most of the canals and some of the controlling works but not the dam. I worked there three months. Before 1908 I was in the building business in New York as an engineer. After this irrigation work in Blaine County I was drawing plans in Oregon for an irrigation system for the Arnold Company of Chicago, also was chainman. George H. Binckley was my superior. [245]

Part Cross-examination of Roberts.

In March, 1910, I became Carey Act Inspector for

(Testimony of Paul S. Roberts.)

Idaho and worked until August 1, 1911. I was over the Big Lost River Irrigation Project to see that the contract as made with the State of Idaho was complied with. I don't know who was the engineer in charge for the Big Lost River Irrigation Company. I recognized Mr. Drummond as the engineer in the field. Whether he was in charge for the Company or not, I couldn't say; I didn't pay any attention to that; I didn't care. I recognized him as being there having charge of that work. I never considered the relative authorities of the various engineers on the project. (506.)

The other engineers were in charge of the various divisions of the work; I considered Mr. Drummond in the field. I looked to Mr. Drummond as being the chief engineer as far as the work there on the ground was concerned. If there was any protest to be made, I made it to Mr. Drummond if he was present at the time and place; if not, I made it to the engineer in charge of the particular work at the particular place. I remember of making a protest to Mr. Drummond about the crossing the fill on a diagonal track. I told him it was contrary to the specifications, as I understood them. I don't recall as to giving it to him in writing. I don't remember what he said; he didn't stop. (507.)

I talked with him about it. I don't recall the conversation. I didn't pay much attention to it except to protest. I don't recall whether he said anything about what he would do. I don't know whether he refused or not; he did not advise the work to be

(Testimony of Paul S. Roberts.)

changed to conform to the specifications. I knew the contractors that were working there, Corey Brothers Construction Company. There were no subcontractors at the dam. (508.)

The only crossing I referred to as being contrary to specifications [246] was the fill crossing the dam. There were undoubtedly many minor points that we spoke about at that time; nothing of any large importance. I wasn't there every day. I had other territory to look over. I made a report to my superior, the state engineer. (509.)

It was on the 27th day of April, 1910. (Witness shown a document and identifies it as his report of April 27, 1910.) In that report, I said: "I submit herewith a report on the Big Lost River Land & Irrigation Company's project." By that, I meant the dam that was being constructed below Mackay. (510.)

In that report, I further reported: "*At the Mackay dam.* The concrete around the controlling valves at the outlet end of the tunnel is completed. It is free from cracks and checks and finished in a thorough and workmanlike manner." That statement was true to the best of my knowledge at that time and I thought it was a pretty good piece of work. I further reported as follows: "There is to be a protecting shield of concrete over the valves to protect any rocks from above falling on to the valves. This shield has not been built as yet. The rocks above the controlling valves, which support the spillway channel, are badly cracked and fissured.

(Testimony of Paul S. Roberts.)

The water flowing out of the controlling valves will erode this bank and undermine the rocks above, endangering the spillway channel." This tunnel was not built according to the plans. I did not say in my report that it was all right. I knew the tunnel had been built before I got there or practically so and if it had been allowed to go on it was somebody else's business and not mine. I don't know that I expressed my opinion concerning that tunnel at that time. I was simply getting acquainted with the work and had not investigated enough to form any definite opinion as to the nature of the work. I don't know [247] that I knew that the plans and specifications did not call for a tunnel. I didn't have the plans and specifications there with me. (512.)

I had seen the plans and specifications in the State Engineer's office before going up, and I was under the impression that said plans and specifications would be at the job. I found that not to be the fact and could only make such report as was evident on the face of the work at that time until I should have the plans and specifications, before me. I was there to see whether the work was being done according to the plans and specifications that the Big Lost River Irrigation Company had with the State. I wasn't there to give instructions how the water should be dumped out of the spillway or how the tunnel should be run. In my report, I further said: "I would suggest that the present retaining wall of concrete on this side of the controlling valves be ex-

(Testimony of Paul S. Roberts.)

tended some fifty feet to prevent this erosion.” There were no plans or specifications that called for that. It was my privilege to give these suggestions.

Q. I thought you were only to find out whether the work was being done according to plans and specifications, that you weren’t to give any advice. (513.)

A. That is also true in part. We were always asked to give all possible information to our office; that was understood.

Q. Well, now, you say the plans and specifications didn’t call for that at all. Did you want the State Engineer to have this company go to work and do something the plans and specifications didn’t call for?

A. No, I wouldn’t say that was true. We would only request or suggest that changes be made in the plans and specifications to fit the various conditions. [248]

Q. So that those plans and specifications, as the occasion arose, should be changed, shouldn’t they?

A. Not necessarily so.

Q. Then what do you mean by this (reading): “I would suggest that the present retaining wall of concrete on this side of the controlling valves be extended some fifty feet to prevent this erosion,” if that wasn’t in the specifications and plans? Why did you suggest—why did you write that?

A. I thought it would be a good thing to add to the plans and specifications.

Q. And to that extent you were changing the

(Testimony of Paul S. Roberts.)

plans and specifications?

A. I was merely suggesting it.

Q. I thought that you were not out there to make suggestions, that you were only out there to see whether the work was done according to the plans and specifications.

A. That was part of our office, yes, sir.

Q. Now, did you have some other duty to perform while you were there?

A. The duty of keeping our office fully advised as to the facts. (514.)

Q. And if you saw something that wasn't done, or that should be done that was not in the plans and specifications, you should make that suggestion?

A. It was in our province to suggest, if we saw fit, yes, sir.

Q. Was that in your orders?

A. So I understood, yes.

Q. How did you come to understand that?

A. In conversation with Mr. Martin before assuming the duties of the office. [249]

Q. Then, if you went out there and found that the dam wasn't being, or was being constructed according to the plans and specifications, but you didn't think it was safe, you could suggest what should be done to make it safe, is that it?

A. Perfectly proper, yes, sir.

Q. And you did? A. Certainly.

Q. So now I understand you had other duties besides those of simply finding out whether the work was being done according to the plans and speci-

(Testimony of Paul S. Roberts.)

cations, didn't you? A. Yes, sir. (515.)

I further reported in my report as follows: "On April 26th, the water in the reservoir had covered an area of sixty to seventy acres, and the tunnel and controlling valves were flowing full. The water along the face of the dam had covered the concrete apron for a distance of 32', measured along the slope. As the water in the river is steadily rising it will cover more and more of this apron, preventing the placing of another layer of concrete to increase the thickness of the apron, as recommended. Horizontal cracks have developed in this concrete apron, at the water-line, and extend along the entire face of the apron. At the corner of the apron where it turns back along the east portal of the tunnel, there is a vertical crack extending from the water-line down the surface of the apron. The concrete on the dam side of this crack has settled below that on the portal side about four inches. This is due to the fact that the water getting under the apron at the bottom of the dam caused the material in the dam to settle away from the apron. This cracking and local settling of the facing along the dam, I do not consider serious, except that it indicates [250] the necessity of making this facing 6" thick as recommended in Mr. Fell's report of April 2, 1910." (518-19.)

I further reported in my report as follows: "Work on the spillway tunnel is progressing rapidly." The spillway tunnel is around twelve or fourteen feet from floor to roof. I don't know whether the top of

(Testimony of Paul S. Roberts.)

the spillway tunnel was four feet above the top of the dam. The plans and specifications didn't call for any tunnel at all. (522.)

Q. Did you make a report to the State Engineer that the Irrigation Company wasn't carrying out their contract with the State in this respect?

A. Not in that respect, no, sir.

Q. Why didn't you?

A. I didn't know that it was contrary at that time to the plans and specifications.

Q. Didn't Mr. Fell tell you that? A. No, sir.

Q. This was a pretty important matter, wasn't it?

A. It has since proven to be quite so.

Probably the spillway tunnel was of more importance to the structure than the underbrush out in the water. I did not know of my own knowledge that the top of that tunnel as constructed was designed to be four feet higher than the top of the dam. (523.)

Q. Continuing (reading): "Another gang of men is removing the earth and loose-rock down to the solid rock, where the core-wall joins the cliff at the west end of the dam. This work is also progressing as rapidly as possible. The contractor is working continuously with a day and night shift.

"At the Diversion Dam, Above Darlington.—
[251]

Mr. POWELL.—Let me ask you, Judge Henderson, do you understand that to mean that the contractors are working continuously day and night shift at the—

Mr. HENDERSON.—No, he is starting off on a

(Testimony of Paul S. Roberts.)

new subject now. (Continuing.) "Three men are working here, placing the controlling gates. There were also three men removing the forms from the concrete of the Darlington head-gate. This force will have to be increased if these controlling works are to be completed before water is turned into the canal May 1st. The iron work for the Darlington head-gate has not arrived at the site. All the controlling mechanism at this point should be in place and tested before water is turned on. After water is turned on, it will be impossible to make any changes or adjustments without making a temporary opening in the levee, which should be avoided if possible.

"*At the Diversion Dam, below Powell.* No work is being done on this structure at present. The rock excavation for the main canal below this dam is about completed, and only a small part of the concrete work at the head-gates has been completed."

At the time when you was there was the work being done all right and according to the plans and specifications?

A. You are speaking now of the head-gate below Powell?

Q. Yes. A. Yes, sir, it was.

Q. Now, there is another subject: "*Canals and Structures Blaine and Era Canal.* The Blaine and Era Canals are practically finished. The tunnel on the Blaine Canal is in the same condition as when last reported." Do you refer to any report you had made there? A. No, sir. [252]

(Testimony of Paul S. Roberts.)

Q. Mr. Fell's report? A. Yes, sir.

Q. (Reading:) "The drops are about finished. On drop #9, the first drop north of the tunnel on the Blaine Canal, the concrete is being put in without any reinforcement. Parts of the concrete show cracks, due to too rapid drying. I instructed the engineer on this work to keep the concrete moist, allowing it to dry slowly and prevent cracking. I called Dr. Drummond's attention to the fact of the concrete being put in without any reinforcement, and he said he had sent reinforcing material to the site, with instructions for it to be used in the work." Do you remember what engineer was doing that work—not what engineer, but what contractor besides Corey Brothers Construction Company—they were the original contractors.

A. My memory is that it was a firm by the name of Falk & Childs.

Q. Feckle & Childs?

A. I thought it was F a u l k (spelling the word) & Childs, as I remember it; I wouldn't be sure about that.

Q. Were they subcontractors under Corey, do you know?

A. I don't know; I understood they were.

Q. Feckler & Childs?

A. I wouldn't even know if it was spoken, to be sure.

Q. You called Mr. Drummond's attention to that, didn't you? A. Yes, sir.

Q. You didn't say anything about it to the sub-

(Testimony of Paul S. Roberts.)

contractor? A. Oh, no.

Q. Why didn't you?

8. The subcontractor wouldn't have taken any instructions from me, if I had any authority to give it to him.

Q. You went to the man in charge of the works according to the [253] contract with the State of Idaho, didn't you?

Mr. POWELL.—Objected to as incompetent, and calling for his conclusion.

Mr. HENDERSON.—Q. That is to say, you thought when you were speaking to Drummond that you were talking to the man that represented the Big Lost River Irrigation Company?

Mr. POWELL.—Objected to as incompetent, calling for his conclusion, and immaterial, what he thought.

Mr. HENDERSON.—Q. Didn't you?

A. He represented them in the field, yes, sir.

Q. (Reading:) "The concrete was being placed on the solid ground without any provision being made for drainage." Do you know whether the contract called for that or not? A. No, sir.

Q. Or the plans and specifications?

A. I don't, no, sir.

Q. Whether they did or not, you thought drainage ought to be put there, didn't you? A. Yes, sir.

Q. (Reading:) "A gravel foundation should be laid first, and the concrete then placed. I also called the engineer's attention to this matter." Now, do you remember what engineer that was?

(Testimony of Paul S. Roberts.)

A. No, sir, I do not.

Q. Well, do you think it was Mr. Drummond?

A. It was not Mr. Drummond.

Q. Mr. Huff? A. Not Mr. Huff.

Q. You know both of those gentlemen, do you?

A. I do, yes, sir. [254]

Q. So when you say the engineer here, you don't know which one?

A. There was some subordinate in charge of that work, and I don't know his name.

Q. What did he say to you?

A. I don't remember as to that.

Q. Did he refuse to do it?

A. Evidently not, or I would have noted it in the report.

Q. Will you say now that because you didn't state it in the report he didn't refuse?

Mr. POWELL.—That is objected to as calling for a conclusion, and incompetent and immaterial.

A. Undoubtedly he made no comment except that he would take it up probably with his superior, in which case there would be no mention made one way or the other in the report, which would be perfectly proper to do on his part. (530.)

I further reported: "The concrete syphons on the north and south forks of Antelope Creek crossing are finished. The forms are removed from the concrete on the north fork crossing, and partially removed on the south fork crossing. Temporary gates are installed in both syphons."

Q. Have you got a photo of that?

(Testimony of Paul S. Roberts.)

A. I don't believe there is one in this set that I have in my hand.

(Mr. Powell exhibited photograph to witness.)

A. (Continued.) This is one of the Antelope crossings.

Q. Did you introduce a photograph like that in evidence?

A. Not like that. There is one taken by Mr. Storrow that is practically the same thing, shows the same thing.

Q. Do you remember what exhibit that was?

Mr. POWELL.—Mr. Storrow can find it, no doubt.

[255]

Mr. HENDERSON.—Let me see it.

(Mr. Storrow handed photograph to Mr. Henderson.)

Mr. STORROW.—There is the other side of it.

Mr. HENDERSON.—Q. I show you Defendants' Exhibit No. 12. See if that is the structure that you referred to in your report that I have just read.

A. That is one of the crossings; I couldn't be sure as to whether it is the north or the south fork, however; they are very similar.

Q. There was nothing there that you disapproved of, as Carey Act Inspector, was there?

A. That crossing had been completed, and it would have been useless to have found fault with it at that time, the first inspection; these would all come later.

Q. Did you ever make a report saying that that was not in accordance with the plans and specifications? A. I think not; no, sir.

(Testimony of Paul S. Roberts.)

Q. You thought that was all right, didn't you?
(531.)

A. I never compared it with the plans and specifications; I had no notion whether it was or was not. It was completed.

Q. Well, it looked good to you, as an engineer, didn't it? A. The concrete looked good.

Q. The plan down there looked good, didn't it?

A. I never considered it at all, didn't think anything about it; I was busy with other matters.

Q. That was what you were down there inspecting it for, to see whether it was done according to the plans and specifications.

Mr. MILLER.—Objected to for the reason that it is arguing with the witness.

A. This was not being done; it was already done.
[256]

Mr. HENDERSON.—Q. Did you have any fault to find with it, as Carey Act Inspector?

A. I had nothing to say about the finished products; they were completed before me—the man before me, it was his business to look into those.

Q. If it hadn't been completed according to the plans and specifications, should you have called the state engineer's attention to it?

A. No, not in a finished structure, I wouldn't have gone to the trouble to find out; there were so many live wires going.

Q. Then do you mean to say, Mr. Roberts, that after the dam had been finished, if it was not finished according to the plans and specifications, you

(Testimony of Paul S. Roberts.)

wouldn't have called the state engineer's attention to it?

A. If it had been finished, I wouldn't have been there as an inspector.

Q. Supposing you had been sent over there even after it was finished, would you have found any fault with it? (532.)

Mr. HAGA.—Objected to as improper cross-examination and mere supposition.

A. In that case I would have been advised to report on its conforming with the specifications.

Mr. HENDERSON.—Q. Wasn't that a part of your duties when you went along down that canal and you saw some work completed and it was not in conformity with the plans and specifications, to notify the state engineer?

A. No, sir, not that had been done previous to my advent on the work.

Q. (Reading:) "The embankment extending from the wing walls along the banks of the creek are roughed in at the North Fork [257] crossing and only begun at the South Fork crossing. This work can be finished at any time. For characteristic view showing conditions at both crossings see Photo #8, Roll #1." Have you got that photo here?

A. I have not; no, sir.

Q. I think we had a photo introduced, did we not? (Reading:) "The 4' syphons for the crossings of the five Darlington ditches are completed; also all bridges on this canal."

Mr. HENDERSON. — Weren't those syphons

(Testimony of Paul S. Roberts.)

there in controversy here with Mr. Storrow? Didn't you introduce a picture here showing that?

Mr. MILLER.—Yes, the same thing that has just been shown here, the picture on the other side of it, showing the other side.

Mr. HENDERSON.—Q. I show you, Mr. Roberts, Defendants' Exhibit No. 15. When you made your report on April 27th was that work completed like that?

A. With the exception perhaps of the installing of the windlasses. (533.)

Q. But outside of the windlasses the work had all been done? A. Yes, sir.

Q. Did you look that over carefully?

A. Yes, sir.

Q. And what place is that on the canal?

A. That is the diversion dam and spillway at the head of the Blaine Canal.

Q. And what is this opening over here?

A. That is the sluice-gate, the waste-gate.

Q. That is to draw the water back away from the gates of the canal?

A. That is to let out material that wouldn't go over the [258] weir and that you don't wish to go into the main canal—not necessarily draw the water away from the gates.

Q. You thought, as Carey Act Inspector, that that was all right, didn't you?

A. That was also completed when I went on to the work.

Q. Did you try to find out whether that was com-

(Testimony of Paul S. Roberts.)

pleted according to plans and specifications?

A. Not at all, no, sir.

Q. But it did look all right to you as an engineer?

Mr. MILLER.—That is immaterial.

A. The concrete looked good. I didn't even pass judgment on it in my own mind, as to its engineering features.

Q. Will you look at it now after this long and see what you think about it, as an engineer?

Mr. MILLER.—Objected to as not cross-examination.

A. Other witnesses have testified on the stand that it was not.

Mr. HENDERSON.—Q. I am not asking about other witnesses; I have heard the other witnesses. (534.)

A. I wouldn't feel competent to contradict their statements.

Q. Have you any independent judgment of your own? A. Yes, sir.

Q. What do you say, of your own judgment?

A. It was very nice concrete.

Q. What do you say about putting the waste-gate where it was, or where it is now?

A. It seems highly impracticable on that side.

Q. Why didn't you report that to the state engineer, then? A. It was already there.

Q. That is true, but you were down there to inspect, were you not? [259]

A. I wasn't down there to tear down structures and rebuild them.

(Testimony of Paul S. Roberts.)

Q. No, but when a structure was not completed according to the plans and specifications, didn't you consider it your duty to call the attention of the State Engineer to it?

A. I never compared that structure with the plans and specifications.

Q. But in the first part of your report you didn't hesitate to make suggestions about the spillway, did you, about the water when it went through the spillway or tunnel? A. I did not, no, sir.

Q. And when you saw something that needed doing differently from what the plans and specifications called for, you called it to the State Engineer's attention, didn't you, in this very first part of your report that I have read to you?

A. In the nature of an amendment or addition, not perhaps different from the plans and specifications.

Q. All right; when you saw anything wrong, you thought it was your duty to call it to the State Engineer's attention, didn't you? (535.)

A. Yes, sir.

Q. You didn't see anything wrong when you went down there to where the Blaine canal is, did you?

A. This one, you mean?

Q. Yes, sir. Is that the Blaine?

A. This is the Blaine, yes, sir.

Q. Yes.

A. I didn't know that was different from the specifications; I didn't compare it with the plans.

Q. I am not asking you that, but I am asking you if, when you were there, it looked all right to you,

(Testimony of Paul S. Roberts.)

as an engineer? [260]

Mr. MILLER.—He has answered that, and said he didn't consider that thing at all.

A. I didn't analyze it.

Mr. HENDERSON.—Q. If it does not look good to you now from an engineering view, did it look good to you then?

Mr. MILLER.—He has answered that three or four times, and for that reason I object.

Mr. HENDERSON.—I want him to answer my question direct.

Q. Why were you considering other features in connection with that structure and calling the State Engineer's attention to them, and then didn't call his attention to something you say isn't right now?

A. What I know to be right now, and what I knew to be right then—

Q. Are two different matters?

A. Are entirely different.

Q. Is that because you have heard other engineers testify? A. No, sir; not necessarily. (536.)

Q. What has happened besides the testimony of other engineers to change your mind, if you have changed it?

A. I don't know that I have changed my mind in the matter.

Q. But you seem to have,—you seem to have a different opinion now than what you had when you were down there, is that true?

Mr. MILLER.—Objected to as not being based on anything the witness has said in any way, shape or manner.

(Testimony of Paul S. Roberts.)

A. In some cases you speak of, I had not formulated an opinion; therefore, I could not have changed it at this time.

Mr. HENDERSON.—Q. (Reading:) “The Powell Tract. The main canals are nearing completion rapidly. Work is progressing rapidly on the drops, [261] which will be finished by the time the canals are finished. None of the smaller laterals have been begun. At station 330 on North Canal, the canal runs through a rocky point. The top of the rock is about two feet below the surface of the ground, and extends down below the grade of the canal. This formation is full of holes and fissures and when these are opened by the blasting there is a strong current of air down into the rocks. This would indicate the presence of a cavern or passageway below the surface. This formation extends for 321’ along the canal and will need to be lined with concrete. Photo #9, Roll #1.” Did you bring over a photo of that, Mr. Roberts?

A. No; that probably didn’t come out right either in the taking or development; that is why it is absent from the report.

Q. (Reading:) “The entire work is progressing as rapidly as possible and with the exceptions noted is in good condition. The canals will be ready for water at the specified time.” Then there are two other pages. The one refers to the working force on the project, which is page 8, and on page 9, without reading it, “I am mailing under separate cover one roll of films,” and then naming them. That con-

(Testimony of Paul S. Roberts.)

stituted all of your report of April 27th, did it not? (537.) A. So far as I know, yes, sir.

Q. Now, do you remember when you made another report?

A. It was about a month later; I couldn't recall the exact date. (538.)

On May 20, 1910, I wrote a letter to the Hon. D. G. Martin, State Engineer, which reads as follows:

"Sir:

I have been unable to locate a set of the specifications stamped with the State's approval, for this work of the Big Lost River project. Mr. Drummond, the engineer on the work, has told [262] me repeatedly that they were somewhere on the work, but my efforts have been unable to locate them. In view of the many rumors current here of injunctions by the railroad company and others stopping the work on account of its being dangerous to property in the valley, and the general fear of the community, I believe the above specifications should be here and always available; in order to protect the State I think it advisable to stop the work if necessary till the specifications are produced, and I ask for authority to do this. Mr. Drummond contemplates a change in the construction of the core-wall which does away with the sheet steel piling in the last fifty feet of the wall, and instead of the piling excavating to a depth of ten or twelve feet before placing the concrete. The reason for this change is that the boulders prevent the driving of the piling. I believe it to be better construction to continue the steel pil-

(Testimony of Paul S. Roberts.)

ing as originally planned, and remove all boulders until the piling will drive to place. I told Mr. Drummond that I would not assume the authority for the change, and for him to submit the change of plan to you for your approval before going ahead. Respectfully," That was signed by you? A. Yes, sir.

Q. As Carey Act Inspector? (539.)

A. Yes, sir.

Q. So you had a talk with Mr. Drummond about driving steel piling? A. I did.

Q. And you told him that he had better talk with the State Engineer? A. Yes, sir.

Q. Now, it would seem that up to this time, you didn't have any plans or specifications of the work? [263] A. Is that a question?

Q. Yes.

A. We did not have at the dam, or in their Mackay office there were no plans or specifications of the work. There were plans and specifications, but, as Mr. Drummond said, they were somewhere, but I wanted them where I could see them myself, on the work.

Q. Well, I don't quite understand this part of your letter then: "I have been unable to locate a set of the specifications stamped with the State's approval for this work of the Big Lost River project. Mr. Drummond, the engineer on the work, has told me repeatedly that they were somewhere on the work." Did you have any specifications there that were not stamped with the State's approval?

A. I believe there was a plan, yes.

(Testimony of Paul S. Roberts.)

Q. That is what I wanted to find out. Now, what was that plan?

A. As I remember, it was a general plan of the dam only.

Q. Like these blue-prints that have been introduced in evidence?

A. It was a big blue-print, yes, sir; I don't know whether there is one here like that or not. (540.)

On May 27, 1909, I made another report to the State Engineer, which reads as follows:

"Hon. Daniel G. Martin, State Engineer,
Boise, Idaho.

Sir:

Herewith I submit report on the Big Lost River Irrigation Co.'s project:—

At the Mackay Dam.

The first, or foundation, section of the concrete [264] core-wall, across the old channel of the river, is completed to within 100' of the west end of the dam. Before the concrete was placed, the earth in the forms was excavated to a firm foundation, which was from 5 to 7' below the top of the sheet steel piling. This allowed the concrete to make a firm band with steel piling. There was several feet under water but no flow, in the forms at the time the concrete was put in. The placing of the concrete began at the end of the section where the old concrete had stopped, and the new concrete was pushed down the slope of the old concrete into the water, continuing in this manner to the end of the forms. This method prevented any separation of the cement and gravel in

(Testimony of Paul S. Roberts.)

the concrete. At the center of the old river channel temporary openings are left in the core-wall. These openings are one square foot in area and spaced vertically two feet apart. This is to allow a passageway for the considerable amount of water that seeps through the gravel embankment in front of the core-wall. This water is now diverted around the core-wall. The second lift of the core-wall is being placed as rapidly as the foundation section has become hard. Two concrete mixers are being used and the (543) work pushed as rapidly as possible.

Film #5, Roll #1 shows the form work and concrete on this section of the core-wall.

A force of men is removing the earth and loose rock from the cliff where the core-wall will join the solid rock on the west end of the dam.

Work on the first and second lifts of the earth embankment in front of the core-wall is progressing simultaneously and as rapidly as possible. The first lift is nearly completed as far as the core-wall will allow, and the up-stream section of [265] the second lift is finished to within a hundred and fifty feet of the west end of the dam. Six gravel trains are now in operation on this work,—the sixth locomotive being placed in commission on May 17th.

Film #4, Roll #2, shows the work on this part of the construction, and Film #6, Roll #2 shows the method of transporting the sixth locomotive from Mackay to the dam.

The excavation of the tunnel section of the spillway channel is completed. There remains about

(Testimony of Paul S. Roberts.)

twenty feet of open cut work to complete the entire excavation of the spillway channel.

A few small leaks have developed in the concrete at the outlet end of the tunnel at the controlling valves. These leaks apparently come from places in the joints of the steel pipe under the concrete, which were not caulked sufficiently tight. It is the intention of the company to do nothing toward stopping these leaks at present. When sufficient water has been stored in the reservoir to give the maximum pressure in the tunnel these leaks will be traced back to the joints and the joints properly caulked.

The iron trash rack at the intake end of the tunnel had to be removed on account of the large amount of brush which (544) collected. A temporary wooden trash rack has been built across the portal of the tunnel. One man is always on duty at this trash rack during the day, and two at night, keeping the brush removed.

Film #6, Roll #1, is a view of this rack. Film #6, Roll #2, is a view of the trees and brush in the reservoir, and Film #5, Roll #2, is a view of some logs and brush floated down to the dam. These views show the necessity of continuous duty at [266] the trash rack.

Work on the dam is progressing continuously day and night.

CANAL SYSTEMS.

The head-gates on the Blaine Canal at the diversion dam above Darlington are in operation. The gates are now raised six inches. A brush dam has

(Testimony of Paul S. Roberts.)

been built in the temporary break in the levee above the dam, which raises the water four feet on the gates, but not high enough to flow over the weir in the dam. There is now two feet of water in the Blaine canal.

The hoisting jacks which operate the gates are placed temporarily on large timbers over the gates and in front of the arches on which they are to be permanently placed.

Film #3, Roll #4, shows these hoisting jacks as now placed.

In the concrete arches, which will eventually carry these hoisting jacks, holes have been cut, through which the cables are to pass from the gates to the jacks. The only reinforcing material which shows in these openings is 6" mesh wire fencing. As these arches are very thin, if there is no other reinforcing material in them than this fencing, they will not be strong enough to carry the hoisting jacks and the weight of the gates. (545.)

A watchman has been permanently stationed at the dam.

All the structures on this canal are finished. Film #2, Roll #1, taken May 13th, in a view of Drop #9. This concrete work is very poor. It is rough and patched, and will easily crumble under the foot in some places. The other drops are in much better condition, and show good construction. Film #1, Roll #4, shows drop #9 on May 25th, with water in the canal. The water was washing the earth banks of the canal just below the drop, and these banks will

(Testimony of Paul S. Roberts.)

have to be riprapped. It is the intention of the company to place such riprap as will be found necessary, after [267] the canal has been in operation a season.

The portal walls at the lower end of the tunnel just below drop #9 are a shale and clay formation. These walls are nearly vertical, and show a tendency to erode. A very slight erosion would cause caving of the banks, and it will probably be necessary to line this section of the canal with concrete.

Some leaks have developed at these points along the canal where the canal passes through rocky points and the banks are made for the most part of the coarser material taken from these cuts. At one point this leakage was about one second-foot. Concrete lining of the canal will probably be necessary at these places.

On May 13th, the form work for the head-gates of Era and Lower Blaine canals was begun. Film #1, Roll #1 shows the starting of this work and Film #2, Roll #4, shows the finished concrete, with water in the Era canal on May 25th. This concrete is hard and uniformly good. The long drop just below the Lower Blaine headgate was being built. The finished part of this concrete is well done and showed good workmanship. No provision had been made in this 1400 feet of concrete chute for any expansion joints and Mr. Martin requested the engineer to put (546) in such joints where needed.

The excavation for the other three drops and for two private ditch syphons on the Lower Blaine Canal

(Testimony of Paul S. Roberts.)

is finished, but the concrete work on these structures has not been begun. The bridges over the canal are completed.

ERA TRACT.

The excavation for canals and laterals on the Era Tract is nearly completed. The material for the two flumes on this tract is being hauled from Arco, and the work of erecting the [268] flumes will begin as soon as the materials reach the site.

The concrete head-gates of the laterals are being built.

All bridges across the main canal are finished.

Water was turned into the main canal on May 20th.

ARCO TRACT.

The concrete work on the head-gate of the Arco Canal has not been started.

This canal crosses Spring Creek, at a point one quarter of a mile below the Head Gate. Film #4, Roll #1, shows the wooden culvert being placed at this crossing. This culvert is made of 2"x12" plank on 2"x6" uprights. There are no diagonal braces or stiffening of any kind. When in place it will be almost entirely submerged. An iron pipe culvert was originally planned for this crossing, but the engineer claims they could not excavate to lower the pipe below the bottom of the canal. By going to either side of the present point of crossing it would be possible to excavate for the placing of the pipe and for concreting of the ends. I would recommend that this be done later as the wooden culverts at best

(Testimony of Paul S. Roberts.)

will be but short lived. (547.)

Film #3, Roll #1 shows the temporary inlet into the canal, of private water. This is water belonging to some old properties under the canal, and is not of the company's filings. The constructing of the Arco Canal necessitated the abandoning of an old private ditch, in consideration of which the company has agreed to carry these private waters in its canal.

Temporary boxes and headgates of wood have been built on this canal. These are to be replaced later with concrete structures.

The one drop in the canal, and several of the bridges are not yet completed. [269]

The excavation and embankment along the canal has been left in a very rough and unfinished condition. At several places the canal has not been excavated to the required width. At two places, the banks are a foot or more below grade and for a distance of three hundred feet. It will require a good deal of work to bring this section of the work up to the standard of the rest of the project.

POWELL TRACT.

Carpenters have begun setting forms for the Head Gates on the North Canal at the Diversion Dam below Powell. Films #1 and #9, Roll #3 shows the rock formation and foundation for these gates.

Film #8, Roll #3 shows the first Drop below the head-gates as finished. The concrete in this Drop is good and the riprap well and carefully placed.

Film #2, Roll #3 shows drop #2. This drop is nearly completed. The rough spots in the concrete

(Testimony of Paul S. Roberts.)

are to be finished over by hand. The gravel and sand used in this concrete contains some loam, but the concrete seems hard and good.

Film #3, Roll #3 shows the form work in place at drop #3 (548) ready for the concrete. This drop will be finished after which the concrete at the head-gates will be put in.

Film #4, Roll #3, shows drop #4 and all other drops below #4 are in a similar state.

No concrete work has been done below Drop #3 on any of the structures.

None of the bridges have been built on this tract.

The excavation on the North Canal is finished for the first six miles. Below this point the canals and lateral are in various stages of completion. [270]

No work has been done on any of the head-gates or flumes on the tract.

Views #5, #6 and #7, Roll #3 show the rock formation on the Lower North Canal. This canal runs through the lava rock for the first twelve miles of its length. At places the banks have been made from borrow-pits, and the embankment rests upon the lava at the top of the ground. When possible the ground beneath the embankment has been scored, but at a few places the rocks have made this impossible. The earth in these embankments is very fine, but considerable seepage will probably occur between the face of the rocks and the embankment.

The telephone lines between Mackay and the Dam and from Moore to the Diversion Dam above Dar-

(Testimony of Paul S. Roberts.)

lington are completed, and communication established.

The work in general is in good shape and progressing rapidly."

Q. When you made this report, Mr. Roberts, you made a report you thought was true?

A. Yes, sir.

Q. And it was true?

A. I think so, in the main. (549.)

Q. Have you any explanations to make now that it wasn't true in any respects, or incorrect, rather?

A. I think not; the report takes care of that—it says "in general," I believe you read.

Q. You thought the sheet steel piling was all right on the 27th day of May, 1910?

A. That was before they drove any that I saw driven; there was some in at that time. [271]

Q. Did they drive any sheet piling while you were there? A. Yes, sir.

Q. Do you know about how much they drove?

A. What do you mean, for length, along the trench?

Q. How many feet lengthwise of the dam or up and down the dam? A. Lengthwise of the dam?

Q. Yes, lengthwise of the dam.

A. I should judge around, well, forty feet, as I remember it, about that.

Q. Do you know about how much sheet piling was driven there lengthwise of the dam?

A. No, I don't know, not as to the total distance. I had reason to believe that some of it had been

(Testimony of Paul S. Roberts.)

covered up by the concrete; there was some in evidence when I was there, however.

Q. You spoke of that in one of your letters, didn't you, that Mr. Drummond, the engineer in charge, had a way of doing away with some of the piling?

A. Yes, sir.

Q. What sheet piling you saw driven, was it in accordance with the plans and specifications?

A. I think so, yes, sir.

Q. Do you know how much longer, after May 27, 1910, did they drive steel piling? (550.)

A. I don't remember. Probably the next report will mention the fact. Whether it will give dates or not, I don't know.

Mr. HENDERSON.—Gentlemen, I will look over this, and if I don't want it I won't put it in.

Mr. POWELL.—If you do I wish you would offer it and not read [272] it into the record; you can offer it and substitute a copy for it, and not incumber the record in this way. I have no question but what Mr. Roberts will let the reporter take them and write them into the record, if you want to, without taking this time to read them.

Mr. HENDERSON.—Q. Up to May 27th, while you were there on the works the dumping of the material on the dam was done according to the plans and specifications, was it not?

A. I think there was one track used crossing the dam.

Q. I am talking about May 27, 1910, now.

A. Well, I don't know whether there was any

(Testimony of Paul S. Roberts.)

dumping done from this track on the so-called first lift—not trestle, but track—on the first lift. They may have been dumping from that previous to May 27th, but that track was in existence at the time of my coming there, and although it may have been contrary to the specifications the fact that it was still continued left me no choice in the matter.

Q. Did you see them dumping any gravel from track? A. From the track, yes.

Q. You didn't find any fault with that in your report of May 27th?

A. That was all taken up with the state engineer; he understood thoroughly about that matter. We had a thorough understanding, so that it will not appear in the reports. (551.) It was understood between myself and the state engineer that that particular feature would be allowed, since it had been allowed previously under a previous state engineer.

Q. You knew about the plans and specifications for puddling, did you not? A. Yes, sir. [273]

Q. Was that done to your satisfaction while you were there? A. No, sir.

Q. You didn't make any mention of that in your report?

A. I did in a later report, you will find, yes, sir.

Q. I mean you didn't make any complaint on May 27th?

A. I don't know as to that; I don't remember the date now.

Q. You just heard me read that report of May 27th, didn't you?

(Testimony of Paul S. Roberts.)

A. No; in that report, I don't think there was any comment made in that.

Q. Up to May 27th, 1910, was the puddling that you saw done to your satisfaction?

A. The puddling that I saw was done according to the previous plans and under the previous inspector, and I continued the work, allowed the work to continue without comment on that account. I don't know now whether it was satisfactory to me or not. I don't remember at that time whether I had decided as to its satisfaction or not, as far as I was concerned.

Q. But you didn't find any fault with it?

A. I made no mention of it, no, sir.

Q. And those things that you thought of sufficient importance you called to the state engineer's attention, did you not?

A. If I believe that he did not know of the existence of the matters, I did; if I knew that he knew about them I wouldn't necessarily direct his attention to them again. (552.)

Q. Did he know about the puddling?

A. Yes, sir.

Q. And he let it go on?

A. He didn't stop it; it did go on.

Q. How was that puddling done there while you were there? [274]

A. By a stream of water from an inch and three quarters or two-inch nozzle.

Mr. HENDERSON.—Without reading this, I wish this report of June 28, 1910, to go in.

(The following is a copy of said report:)

(Testimony of Paul S. Roberts.)

“Mackay, Idaho, June 28, 1910.

BIG LOST RIVER LAND & IRRIGATION CO.

Hon. D. G. Martin,

State Engineer,

Boise, Idaho.

Sir:

I beg to submit herewith report on the progress of the work of the Big Lost River Land & Irrigation Co.

MACKAY DAM.

The up-stream section of the second lift of the embankment was finished on June 2d, and the dumping toward the core wall, with the necessary shifting of track, begun. On June 3d, the water had risen in the reservoir, until it stood several feet above the base of this second lift. The large stones which formed the base of this lift allowed the water to pass through the embankment. This seepage amounted to fifty second feet. In order to stop this seepage, a stream of water was played on the up-stream face of the embankment and the foot of the embankment was puddled sufficiently to stop all seepage at this point. (553.)

Film No. 4 shows the dumping on the second lift toward the core wall.

The upstream face of the second lift of the embankment has been dressed to proper slope.

The steel sheet-piling was continued from the intended [275] point of stopping, a distance of 80 feet to the base of the rock cliff at the west end of dam. The lengths of piling ranged from 18 feet at

(Testimony of Paul S. Roberts.)

the river end of this section to 9 feet at the cliff end. Each pile was driven to refusal, the last foot with considerable difficulty, indicating a compact stratum at the foot of the piling.

After the forms for the concrete were in place around the sheet-piling, the gravel within the forms was excavated to a firm foundation for the concrete. This excavation was about five feet below the original surface of the ground. Considerable water stood in the forms when the concrete was placed, but there was no perceptible flow, and the concrete was so placed as to cause no separation of the cement and gravel.

From the end of the sheet-piling, to the perpendicular face of the rock cliff, the earth and float-rock was removed to solid rock. A centrifugal pump working continuously during the excavation, kept the considerable amount of seepage water pumped out which allowed this excavation to be easily and thoroughly done.

Film No. 3, Roll No. 3 shows the foundation course for the core wall being placed, and Film No. 2, Roll No. 3 shows the excavation in the rock for the core-wall at this end of the dam.

Film No. 5 and Roll No. 3 shows the first lift of the embankment at the lower toe of the dam. This lift is completed to within 100 feet of the west end of the dam. (554.)

Film No. 1 Roll No. 3 shows the wooden covering over the three valves at the outlet tunnel, next to the rock. This covering is made of 12"x12" timber up-

(Testimony of Paul S. Roberts.)

rights, with 12"x12" timbers placed close together forming a tight roof. The timbers are fastened together with half-inch iron dowel pins 16 inches long driven with sledges. The other three valves will not be covered. [276]

Film No. 6, Roll No. 3 also shows the method of forming the second lift of the embankment toward the core wall. It also shows the concrete gang taking the material from the embankment for the concrete of the core wall.

This view further shows the trestle being built for the third lift of the embankment toward the east end of the dam. This trestle extends from the present end of the third lift at the upstream face of the dam, across the embankment and core wall at an angle of forty-five degrees, to the lower side of the dam. It is the intention of the contractor to begin dumping at the upstream end of the trestle where the third lift now ends, and continue across the dam to the lower side and then parallel to the dam to the cliff at the west end. This method is directly opposed to the specifications which say: Page B13, paragraph 8, Forming Embankment—"by placing two trestles, one in the lower toe, and one in the upper toe of the rising embankment. The material between the trestles may be dumped from the cars toward the center of the dam, taking the general slope determined by the angle of repose of the material as dumped; the only limitation being that each trestle shall be used to the extent that practically the same weight of material is carried toward the center of the dam from

(Testimony of Paul S. Roberts.)

each trestle.' It is obvious that the intended method of forming this portion of the third section of the embankment will not cause the same weight of material to be (555.) carried towards the center of the dam from each trestle. I took this matter up with Mr. Jones, the Engineer of the work, but he seemed to think the intended plan was all right, in that it was easier for the contractor to do it this way. I insisted that the specifications be followed strictly.

No work has been done on the spill-way, as the blasting [277] rolls rock and dirt into the excavation for the core wall below the spill-way, preventing the continuing of work on the core wall.

Work on the dam has been considerably delayed during the last month on account of delayed shipments of coal.

ERA TRACT.

Film No. 6, Roll No. 1, shows the lower flume on Eden lateral. This flume is finished and water is now running in the lateral. The concrete work at both ends of the flume is poor. It is rough and broken at the edges. At the lower end of the flume there is a little leakage around the concrete. This will probably all be stopped as the bottom and sides of the ditch become puddled. The flume is the Maginnis type and well built. It is 550 ft. long and does not leak at any of the joints. The supporting wood-work is of clear lumber of good size and all well bolted together. Film No. 7, Roll No. 1, shows the details of the supporting timbers.

Film No. 8, Roll No. 1 shows the upper flume on

(Testimony of Paul S. Roberts.)

the Eden lateral. This flume is 971 feet long, also of the Maginnis type. It is also well built and tight at the joints. The concrete work at the ends of the flume is very good and there is no leakage around the concrete.

The concrete head-gates for the laterals on this tract are finished. They are all standard type. No gates have been placed. Film No. 9, Roll No. 1, shows the head-gate on Economy Lateral. The upper wing wall is badly cracked. This creek (556) extends entirely through the wall and from top to bottom. This wing wall will have to be removed and rebuilt.

Water was admitted to the Eden Economy & Ebony laterals of this tract, about June 10th. [278]

Film No. 10, Roll No. 1, is a view of a portion of Economy lateral 100 feet below the head-gate, and shows the water washing the banks and bottom of the lateral. The head-gate is near the center of Section 3, T. 3 N., R. 35 E., and the lateral runs east from the main canal. From the head-gate to the E. $\frac{1}{4}$ corner of Section 3, a distance $\frac{1}{2}$ mile, the grade of the lateral is too steep. The ditch is now carrying about one-half its capacity and is eroding the sides and bottom of the lateral for this entire halfmile. Beyond this section of the lateral, the grade is less steep, and the water is not eroding the banks. Some provision will have to be made to prevent this erosion on the first half-mile of this lateral.

Material for the flumes on the Elm and Elm No.

(Testimony of Paul S. Roberts.)

2 laterals is now being hauled from Arco.

Film No. 1, Roll No. 2, shows the opening in the banks of the lower Blaine Canal for a syphon of a private ditch. There are two such places on this canal, the conditions at both being shown in this view. Nothing has been done on the concrete work at either place.

Film No. 2, Roll No. 2, shows a gravel pit in the bottom of the lower Blaine Canal, below Drop No. 3. This excavation is to be filled after the concrete work is finished.

Film No. 3, Roll No. 2, shows the form work at Drop No. 2 ready for the concrete.

Film No. 4, Roll No. 2, shows the finished concrete basin at the end of the 1400 feet concrete chute at the head of the Lower Blaine Canal. This is very good concrete. (557.)

Film No. 5, Roll No. 2, shows the forms in place above the basin at the end of the chute, and Film No. 6, Roll No. 2, shows the concrete head-gate and the upper end of the long chute. Temporary wooden gates are still serving at this head-gate. [279]

No expansion joints were being built in the long concrete chute as recommended by Mr. Martin to Mr. Stevenson on May 25th. The concrete is being placed in alternate and opposite sections, each six feet wide, extending from the bottom of the canal to the top. After these alternate sections have set, the intervening sections are placed. The bottom of the canal is then concreted as far as the sides have

(Testimony of Paul S. Roberts.)

been finished. The first 50 feet of this chute is well done, the concrete is smooth and hard and no joints show. Beyond this strip, the joints are opening as the concrete in the 6 foot sections become hard. The cracks extend from the bottom of the canal to the top of the bank, but do not extend across the bottom of the canal, as this bottom concrete is placed after the sides have become hard, and in one section extending past several side sections, in lengths averaging 50 feet. When Chief Engineer Drummond's attention was called to the matter of no expansion provision being made, he contended that the cracks between the 6 ft. sections would act as sufficient expansion joints. As these cracks extend only down the sides and not across the bottom it is obvious that they would not serve as expansion joints. Further these joints will admit water to the ground beneath the concrete which will heave and displace the concrete the entire length of the chute, at the first frost.

I took this matter up with Mr. Osborne, the Engineer in charge of this work. He agreed to have all joints made tight, and to put in expansion joints of tarred felt, as often as every 200 feet. (558.)

This concrete work has been delayed a good deal during the last month. This was partly due to delayed shipment of cement, and to the fact that the contractor was working on the Arco Head Gate and the head-gates of the laterals on the Era Tract.

(Testimony of Paul S. Roberts.)

ARCO TRACT.

Film No. 3 and 4, Roll No. 1, show the river and canal faces respectively, of the concrete head-gate on the Arco Canal. This concrete is good work. The Gate proper has not been placed.

The face of the head-gate is 10 feet back from the river bank. A temporary excavation from the river to the head-gate has been made with perpendicular dirt banks. All the earth between the wing walls and the river is to be excavated later, and hand laid riprap placed at the base of the concrete wing-walls.

Considerable difficulty was experienced in excavating for the footings of the wing and cut-off walls, on account of the water seeping through from the river into the excavation. By keeping two pumps working continuously, the contractor was able to keep the water down sufficiently to allow him to excavate to the required depth.

Film No. 5, Roll No. 1, shows the rock dam across the river at the Arco Canal head gate. This dam is built of rocks of one-half to one cubic foot of size. It is 10 feet wide on the bottom and 4 feet high, the crest having a width of a single row of stones. The elevation of the bottom of the Arco Canal at the head gate is 2 feet 8 inches above the bottom of the river. The dam raises the water to an elevation of 1 ft. and 4 inches, above the bottom of the canal. This dam will be (559) washed out by high water. It will serve for the present season, but I would recommend that a more permanent structure be placed here before next season of high water. By widen-

(Testimony of Paul S. Roberts.)

ing the dam with more and larger stones a permanent and sufficient structure would be built.

Work was begun on this head gate June 6th and water was admitted to the canal on June 14th.

Nothing has been done toward bringing the embankment up [281] to grade as noted in report of May 27th.

The permanent head gates of laterals on this tract have not been built.

Film No. 1, Roll No. 1 shows the form work for the concrete of the head gate on the North Canal at the Diversion Dam below Powell. Eight carpenters are working on these forms, which were ready for the concrete on June 21st. Cement is at the site and the concrete mixer was being moved from Drop No. 4 to the head gate, to begin the concrete work on June 22nd.

The iron segmental gates for this head gate have arrived at Powell. One of these gates had been hauled to the site, and six men were unloading the other two from the car at Powell on June 22nd. Film No. 2, Roll No. 1, shows the placing of one gate, to a wagon, from the car ready to be hauled to the diversion dam.

The first four Drops on the North Canal are finished. This is all good concrete work. There is no concrete work, and no form work, finished below Drop No. 4.

The concrete work has been delayed three weeks for lack of cement, which has been caused by delays in shipment.

(Testimony of Paul S. Roberts.)

The lumber for bridges is being hauled from Powell, but none of these structures have been built. (560.)

Work on the flumes has not been started.

The excavation for canals and laterals is progressing rapidly. This work is practically completed to within a few miles of the lower end of the tract.

OBSERVATIONS ON FLOW OF BIG LOST RIVER.

Maximum high water occurred on June 3rd at Mackay dam, flow on this date estimated 1600 second feet. On June 27th, flow at Mackay dam 800 second ft. [282]

At Powell on June 21st flow was 80 second feet. Twenty miles below Powell on same date, no flow.

This lack of water in the river will stop work on the canals and laterals except those near enough to Little Lost River to haul water from that stream.

On June 17th, Mr. J. B. Lippincott, Engineer, of Los Angeles, Cal. arrived at Mackay to make an investigation of the conditions at the dam, in the interest of residents and property owners of Mackay. Mr. Lippincott's investigation was most thorough, ending on June 20th at Blackfoot with an interview of Mr. Munson, who did the boring at the dam-site for bed rock. Mr. Lippincott's report, which will not be favorable, is expected about July 10th.

The working force on the project is as follows:

95 men.

13 teams.

2 steam shovels.

(Testimony of Paul S. Roberts.)

5 locomotives.

50 dump cars.

2 concrete mixers.

Canal System.

3 concrete mixers.

2 ditching machines.

280 teams.

460 men. (561.)

I am mailing under separate cover, three (3) rolls of films, one of ten (10) exposures, and two of six (6) exposures each.

Roll No. 1. 10 Exposures.

Film No. 1—From work for head gate of North Canal at Diversion, below Powell.

2—Gates for North Canal, being taken from cars at Powell.

3 & 4—Arco Canal head gates above Arco. [283]

5—Rock Dam across river at Arco Canal Head gate.

6—General view of lower flume on Eden Lateral Era Tract.

7—Details of flume on Eden Lateral.

8—General view of upper flume on Eden Lateral.

9—Head Gate of Economy Lateral on Era Tract.

10—Portion of Economy canal below head gate showing eroding of bank.

Roll No. 2.

Film No. 1.—Opening in banks of Lower Blaine canal for syphon of private ditch.

(Testimony of Paul S. Roberts.)

- 2—Gravel pit in bottom of lower Blaine canal below Drop No. 3.
- 3—Form work for concrete at Drop No. 2 Lower Blaine canal.
- 4—Concrete basin at end of 1400 ft. chute Lower Blaine Canal.
- 5—Forms for concrete at end of 1400 ft. chute above basin.
- 6—Head Gate for Lower Blaine Canal.

Roll No. 3.

Film No. 1.—Timber covering over west set of controlling valves at Mackay Dam.

- 2—Excavation in rock at west end of dam for core wall.
- 3—Placing footing course of concrete core wall at west end of dam. (562)
- 4—Building of second lift of Mackay dam.
- 5—Building of first lift at lower toe of Mackay dam.
- 6—Shows dumping on second lift of Mackay dam; taking material from the embankment to make concrete of core wall; building trestle across dam for third lift of embankment.

Respectfully submitted,

Carey Act Inspector. [284]

(Rubber stamp:) Received in the State Engineer's Office July 1, 1910."

Mr. HENDERSON.—Q. Now, Mr. Roberts, where is that picture that you said showed the sagebrush on the site of the dam, upon which the dam was built?

A. I don't think I said sagebrush. I think I said

(Testimony of Paul S. Roberts.)

vegetation. It was grass or sod, perhaps.

Q. Well, I don't know that I got your words just right—whatever you said.

A. There is one—that is the one right there that shows the vegetation.

Q. When did you take that? I show you now Defendants' Trustees Exhibit No. 39, and ask you when you took that.

A. I believe it was about July the 7th or 8th, if I remember correctly.

Mr. POWELL.—I suggest, Judge Henderson, that the original photographs and the original report, with photographs attached, is here in court, and the witness might be permitted to look at them to fix the date.

Mr. HENDERSON.—Yes, look at that.

(Witness did so.) (563.)

A. That is July 30th—that is as close as I can identify it—1910.

Q. When was the work stopped on the dam?

A. July 23d, I believe, 1910.

Mr. POWELL.—July or August?

Mr. HENDERSON.—July.

Q. Can you fix about the date now that you took Exhibit 39?

A. No, not any closer than that. It was after the dumping [285] started across the trestle, and if the report is dated July 30th it must have been previous to that time or it wouldn't be in the report. That is as close as I can fix the date, between the 6th and the 30th.

Q. Do you know what bond plowing is?

(Testimony of Paul S. Roberts.)

A. Yes, sir.

Q. How is it done?

A. Turn the soil, scratch the soil, to leave it rough in order that one fill may knit to the one already in place.

Q. At what part of the dam was this picture taken?

A. That is just to the left of the river bank. This is either the original surface, or probably been some material on there, but I doubt it very much.

Q. Will you look at that with a glass and take a lead pencil and mark where you see vegetation?

A. I don't need the glass. Have you got a lead pencil?

Q. Don't mark but just a little place.

Mr. POWELL.—Don't cover up the grass.

A. Within the red circle. You can see it there; it is a little red.

Mr. HENDERSON.—Q. How far is that away from the base of the dam?

A. I don't know what you mean by the base of the dam—the upper toe, lower toe—? (564.)

Q. Lower toe.

A. Probably 40 feet; it is in front of the core-wall.

Mr. MILLER.—What do you mean by in front of the core-wall?

A. Upstream side of the core-wall. [286]

Mr. HENDERSON.—Q. When you made that report on July 28th none of the dam had been built on any land that hadn't been bond plowed, had it?

A. I don't remember all the things in that report; I couldn't say without reading over the report.

United States
Circuit Court of Appeals
For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

CONTINENTAL AND COMMERCIAL TRUST AND
SAVINGS BANK, a Corporation, and FRANK
H. JONES, Trustees,

Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Cor-
poration, and UNION PORTLAND CEMENT
COMPANY, a Corporation,

Appellees.

VOLUME II.
(Pages 321 to 700, Inclusive.)

Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.

FILED

APR 22 1913

No. 2264

United States
Circuit Court of Appeals

For the Ninth Circuit.

Transcript of Record.
(IN TWO VOLUMES.)

CONTINENTAL AND COMMERCIAL TRUST AND
SAVINGS BANK, a Corporation, and FRANK
H. JONES, Trustees,

Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Cor-
poration, and UNION PORTLAND CEMENT
COMPANY, a Corporation,

Appellees.

VOLUME II.
(Pages 321 to 700, Inclusive.)

Upon Appeal from the United States District Court for the
District of Idaho, Southern Division.

(Testimony of Paul S. Roberts.)

Q. Was there very much work done on the dam during July, 1910?

A. Not a great deal, no, sir.

Q. So up to June 28th, when you made that report, all the work done on the system was done according to the plans and specifications except as you have pointed out in that report?

A. Well, there was nothing that came to my notice contrary to the—

Q. As far as you could see?

A. As far as I noticed.

Mr. MILLER.—What is that date?

Mr. HENDERSON.—June 28th.

Now, gentlemen, I haven't read this report of July 30th.

Mr. MILLER.—Just take the time to read it.

Mr. HENDERSON.—Mr. Roberts, will you permit the reporter to borrow that of you?

Mr. WITNESS.—Yes, sir.

Mr. HENDERSON.—I introduce this report of the Carey Act inspector from the State Engineer's office, dated July 30th, and signed by Mr. Roberts—this letter isn't signed, but it is one that he wrote—and it can be copied. (565.)

(The following is a copy of the above-mentioned report.)

(Testimony of Paul S. Roberts.)

“Mackay, Idaho, July 30, 1910.

BIG LOST RIVER LAND & IRRIGATION CO.
[287]

Hon. D. G. Martin,
State Engineer,
Boise, Idaho.

Sir:

I beg to submit herewith report on the progress of the construction of the Big Lost River Land & Irrigation Co.

AT MACKAY DAM.

On July 6th, the Company began dumping from the trestle crossing the embankment from upper to lower toe of dam at an angle of 45 degrees. Film No. 1, Roll No. 1, shown the first train load dumping from this trestle. This work was stopped at once, waiting a reply to my letter of July 6th to Mr. Martin stating the facts and asking the advisability of allowing this part of the work to continue. On July 14th, dumping from this trestle was resumed, the company refusing to stop the work when ordered to do so until Mr. Martin's reply was received. The surface beneath this trestle, from the core-wall to the embankment at the upper side of the dam, is the original surface of the ground. The specifications read—Page B 11, Paragraph 3, ‘Before the forming of embankment is commenced the foundation of the dam shall be thoroughly plowed to a depth of 10 inches.’ This was not done, before dumping from this trestle, although the Company's attention was called to the matter. Film No. 5, Roll No. 2, shows

(Testimony of Paul S. Roberts.)

the smooth, unplowed surface of original ground and the coarse material at the bottom of the dump. From this view it is very evident that there will be no bond between the (566) original surface of the ground and the embankment. As the embankment from this trestle approached the 'puddled zone' at the core-wall, a stream of water was played on the embankment as it was built. This stream was entirely inadequate to [288] 'thoroughly wet' the embankment as specifications require. The water was obtained from a line of 2 inch pipe running from the line of pipe supplying water for puddling the embankment at the lower toe of the dam.

The original pumping equipment furnishing water for this puddling process, delivered 5.24 cu. ft. of water per minute. The equipment has been enlarged by the addition of a second pump delivering 3.48 cu. ft. per minute, making a total of 8.72 cu. ft. per minute. This supply of water is drawn upon by two steam shovels, five engines, and when in use, one concrete mixer. The supply of water is entirely inadequate to cause proper puddling of the 'wetted zone' as is shown by the fact that water is flowing through the embankment in considerable volume.

Film No. 6, Roll No. 3, shows the water running through the opening in the core-wall. This water comes through the embankment above the core-wall, and through that portion of the embankment which should have been puddled and made impervious to water.

Film No. 9, Roll No. 3, shows the first lift of em-

(Testimony of Paul S. Roberts.)

bankment at lower toe of dam, being built toward the core-wall, and the stream of water used for puddling. This stream of water does not puddle the embankment sufficiently to stop the flow of water through the embankment as shown by the stream of water below the embankment, which water passes through the material, and is of practically the same volume as is shown in Film No. 6, Roll No. 3, flowing through the core-wall.

Film No. 7, Roll No. 3, shows the puddled material at (567) the back of the core-wall at the point of crossing of the trestle above noted. On the left of this view is shown the embankment which [289] has not been puddled, although it is within the 'puddled zone.'

Film No. 8, Roll No. 3, shows the embankment from which the puddled material shown in Film No. 7, Roll No. 3, was washed.

Film No. 6, Roll No. 1, shows the dressing to proper slope, of the upper face of the dam. The surplus material removed at this dressing of the slope is left on the concrete apron at the foot of this lift of the embankment.

Film No. 4, Roll No. 2, shows this surplus material. It averages 2 feet thick, 15 feet wide and extends along the face of the dam across the entire finished section. This material should be removed, as its weight will cause the concrete apron to break as the material of the embankment settles away from the concrete apron. After the face of the dam was dressed to slope, the concrete apron was put on with-

(Testimony of Paul S. Roberts.)

out tamping the embankment as specified.

The reinforced concrete apron on the face of the second lift has been built. Film No. 2, Roll No. 1, shows the placing of a strip of reinforcing wire. These strips run from the top of the embankment to the bottom. Film No. 3, Roll No. 1, shows the wooden stakes which hold the reinforcing strips at the top of the embankment. These stakes are $2\frac{1}{2}$ feet long, and 3 inches in diameter. They are driven flush with the embankment, one stake at each edge of each strip of reinforcing wire. The lengths of reinforcing wire are tied together at each cross wire by wire clips of same size as the wire of the reinforcing material. Film No. 5, Roll No. 1, shows the gang of men tying the sections of reinforcing wire together. At the junction of this reinforcement with the reinforcement (568) of the lower, completed section, the two are joined by wire clips, one at each edge of each strip. The new reinforcement extending over the finished concrete one foot. This tying of [290] the new reinforcement to the old by only two clips to each strip is not sufficient to make the reinforcement continuous over the joint of new with old.

Film No. 1, Roll No. 2, shows the placing of the concrete on the face of the dam. The concrete was placed over the reinforcement, in strips 6 feet wide extending from the top to the bottom of the embankment. The reinforcing wire was held 2 inches above the embankment by placing the larger stones of the concrete under the reinforcing wire. This concrete

(Testimony of Paul S. Roberts.)

was very poor and not tamped after placed. It was between 4 and 6 inches thick. Work on this section of the concrete apron was begun on July 6th and finished on July 20th, as far as the face of the dam had been dressed to proper slope.

Film No. 2, Roll No. 2, shows the cleaning and wetting of the edge of the old concrete where the new concrete joins the old. The edge of the old concrete was finished on a bevel, and the new concrete overlaps the old 2 feet. The old concrete should have been finished to a square shoulder, perpendicular to the face of the embankment which would have permitted the new concrete to make a firm and tight joint. Film No. 3, Roll No. 2, shows the new concrete over-lapping the old.

The concrete cut-off wall at the end of the apron below the controlling valves was not built on solid rock. Film No. 5, Roll No. 2, shows the north end of this wall and the loose rock on which the wall is built. Film No. 6, Roll No. 2, is a view of this wall beneath the falls showing the loose rock projecting beyond the base of the wall and the holes under the wall that have been washed out by the water. This washing will in time undermine the cut-off wall and apron and they will (569) break. A new cut-off wall should be built to solid rock. [291]

The footing and first course of the concrete core-wall is finished to the rock cliff on west end of dam. At the junction of the core-wall with the solid rock, a good joint was made with concrete and the solid rock. There is no seepage between the core-wall and the

(Testimony of Paul S. Roberts.)

solid rock, but there is a little seepage out of the solid rock behind the core-wall. This seepage does not apparently come from beneath the core-wall. There was considerable flow coming out of the rock in which the trench for the footing course of the core-wall was excavated. Since the footing course and first section of the core-wall have been built this flow has been diverted through the fissures of the rock, beyond the end of the core-wall, coming out behind the core-wall. This water finds its way through the concrete apron on the face of the dam, and through the embankment at the junction of the embankment with the original surface of the hill at this end of the dam.

Film No. 10, Roll No. 3, shows the puddled section of the second lift of the embankment, in front of the core-wall. This slope is the combined length of both first and second lifts, as the first lift was not continued to the core-wall. On account of the length of this slope, the stream of water used is too small to give any puddled condition of the material at the foot of the slope.

ERA TRACT.

Film No. 1, Roll No. 3, shows the west end of flume on Elm lateral. The flume proper is finished but the concrete at the ends has not been built. Film No. 2, Roll No. 3, shows the entire flume from the east end. Some of the supporting timbers are badly split and checked. Except for this the flume is well built. (570.)

The material for the flume on Elm No. 2 lateral has been [292] hauled to the site, but work of

(Testimony of Paul S. Roberts.)

erection has not begun.

The concrete work on the Lower Blaine Canal is as last reported. I am told he has received no money for several months and was on that account compelled to stop work.

Film No. 3, Roll No. 2, shows the action of the water on the portal walls at the lower end of the tunnel on the Blaine Canal. The water has eroded the walls and some caving has occurred. As noted in report of May 27th, these portal walls showed a tendency to erode at that date. Since that time this erosion has increased until the earth has caved in places. It will be necessary to build retaining walls at the lower portal of the tunnel to prevent this erosion and caving.

On July 13th, the gates of the Blaine Canal were closed by Water Commissioner McMillan. The company has acquired some old water rights and this water was being supplied to the Era Tract.

ARCO TRACT.

All construction on the Arco Tract is as last reported.

POWELL TRACT.

On account of the unsettled conditions at the Mackay dam, I have been unable to inspect the workings on the Powell tract. I am told by the Engineer on this part of the work, that the concrete for the head-gates of the North Canal, at the diversion dam below Powell, is completed and the iron gates are at the site; that the concrete for Drop No. 5 has been

(Testimony of Paul S. Roberts.)

placed; that the excavation for canals and laterals is about completed.

There is no concrete work below Drop No. 5 and only three excavating outfits are now working. (571.)

Acting on telegraphic instructions from Mr. Martin, Engineers Drummond and Jones were requested to voluntarily close [293] down all operations at the Mackay dam, on the evening of July 23d. The request was granted and all work is now discontinued.

The working force on this project prior to July 23d has been:—

AT MACKAY DAM.

CANAL SYSTEM.

105 Men.

13 Teams.

1 Concrete Mixer.

2 Steam shovels.

2 Ditching machines.

5 Locomotives.

35 Teams.

50 Dump cars.

50 Men.

1 Concrete mixer.

I am mailing under separate cover three (3) rolls of films: Two (2) of six (6) exposures each, and one (1) of ten (10) exposures each, the subjects are as follows:

Film No. 1—Train dumping from trestle crossing embankment from upper to lower toe of dam, on July 6th.

“ “ 2—Placing reinforcing material for concrete apron on dam.

“ “ 3—Driving stakes to hold reinforcing strips.

“ “ 4—N. G.

(Testimony of Paul S. Roberts.)

“ “ 5—Tying strips of reinforcing wire together.

“ “ 6—Dressing face of dam by hand ready for concrete apron.

Roll No. 2, six exposures.

Film No. 1—Placing concrete on face of dam.

“ “ 2—Cleaning and wetting of old concrete for junction of new.

“ “ 3—New concrete overlapping old concrete at junction of new with old.

“ “ 4—Surplus material left on concrete apron after dressing face of dam to proper slope.

“ “ 5—East end of cut-off wall below concrete apron at valves, showing wall built over loose rock.

“ “ 6—Same cut-off wall beneath falls showing washing of water under the wall.

(572)

Roll No. 3, ten exposures.

Film No. 1—West end of flume on Elm Lateral, ready for the concrete. [294]

Film No. 2—Entire flume from East end.

“ “ 3—Portal walls at lower end of tunnel on Blaine Canal showing erosion of side walls.

“ “ 4—Train dumping from trestle crossing embankment at Mackay dam, July 14th.

“ “ 5—Shows unplowed original surface of ground on which above embankment is being built.

(Testimony of Paul S. Roberts.)

“ “ 6—Water running through temporary opening in core-wall. This volume of water passes through the embankment in front of the core-wall.

“ “ 7—Puddled and coarse, unpuddled material on lower side of core-wall.

“ “ 8—Embankment from which above puddled material was washed.

“ “ 9—Dumping on first lift below core-wall and stream of water used for puddling the material; also width of embankment through which the water is flowing.

“ “ 10—Puddled area in front of core-wall on second lift.

Respectfully submitted,

Carey Act Inspector.”

Mr. HENDERSON.—Q. Mr. Roberts, there was a hole left in the core-wall all the time that you were there, was there not? A. Yes, sir.

Q. That was done to let the water go through the dam? A. Yes, sir, through the wall.

Q. To let the water go through the core-wall?

A. Core-wall, yes, sir.

Q. If that hole hadn't been left the water would have come up and gone over the top of the core-wall, wouldn't it?

A. I don't know; it never did go over the wall. (573.)

Q. On account of that hole being left? [295]

A. No, sir; the hole was stopped several times.

(Testimony of Paul S. Roberts.)

Q. Do you know what that hole was left in the core-wall for? A. Yes, sir.

Q. To let the water go through? A. Yes, sir.

Q. That was done intentionally? A. Yes, sir.

Q. And you didn't find any fault with that?

A. Oh, no.

Q. You say that on July 14th dumping from this trestle was resumed—that is, the trestle that went across the core—the company refusing to stop work when ordered to do so until Mr. Martin's reply was received. To whom did you give that order?

A. I don't know whether it was to Mr. Drummond and Mr. Jones, or simply to Mr. Jones, on the dam; it was at least to Mr. Jones, and I think to Mr. Drummond.

Q. Who was Mr. Jones?

A. He was the engineer that had charge of the dam alone.

Q. For the Big Lost River Irrigation Company?

Mr. POWELL.—That is objected to as calling for a legal conclusion, and not a proper conclusion from this witness.

Mr. HENDERSON.—Q. What is your best judgment?

Mr. POWELL.—The some objection.

A. Certainly, it was the Big Lost River Irrigation Company; he was the engineer for this company, so far as I knew.

Mr. HENDERSON.—I don't want to try to confuse you, but you didn't understand that Mr. Drummond or Mr. Jones were in the employ of Corey

(Testimony of Paul S. Roberts.)

Brothers Construction Company?

A. No, not at all. (574.)

Q. And when you refer to the engineers you are referring to the engineers of the company that had the contract with the state? [296]

Mr. POWELL.—The same objection.

A. Yes, sir.

Mr. HENDERSON.—Q. That is all I wanted to find out. Did you know from the contract of the Big Lost River Irrigation Company with Corey Brothers Construction Company that all of this puddling was done under force account?

Mr. POWELL.—That is objected to as calling for an improper conclusion from this witness as an expert.

A. I never knew anything about any contract or any other instrument between Corey Brothers and the Big Lost River Irrigation Company, or any other company.

Q. You say you never measured the number of yards that were dumped from the trestle that went crosswise of the core-wall?

A. Never measured it with a steel tape, no, sir.

Q. But you have got a judgment on it?

A. Yes, sir.

Q. How much do you think it was?

A. It was several thousand yards, in that particular dump.

Q. How many?

A. I never measured it to know any more definitely than that—computing it roughly.

(Testimony of Paul S. Roberts.)

Q. You might be mistaken about that, that there was several thousand yards?

A. I might be mistaken a yard or two, yes, sir.

Q. You might be mistaken several thousand, might you not? A. Hardly, no, sir.

Q. What do you mean by several thousand—five, six or seven? (575.)

A. More than one and less than fifty thousand.

Q. You say it was more than one thousand? [297]

A. Yes, sir.

Q. Was it less than fifty? A. Yes, sir.

Q. How much less? A. I don't know.

Q. It might have been forty-eight thousand?

A. Possibly.

Q. And it might not have been over two thousand?

A. Possibly.

Q. Did you give any other report later than July 30th, 1910?

A. You mean concerning this project?

Q. Yes.

A. I wouldn't be sure whether I submitted a report as such, or simply a letter of communication. It should show in these files if this is all of them.

Q. Let me ask you, are these two reports the same? Did you make both of them?

A. I expect this is the engineer's copy. I never have seen that until this time. I don't know what they do with these when they come in. This looks to be the same.

Q. What is this? That is what I want to know.

A. Well, now, I don't know. That is evidently the

(Testimony of Paul S. Roberts.)

same as this; I don't know. That probably may be the same report in different form.

Q. Did you send a letter like this to the state engineer, dated April 28, 1910?

A. I think that is my letter, yes, sir, the carbon of it.

Q. Will you let the reporter copy that into the record?

A. I will, yes, sir, so far as I am concerned. (576.)

(The following is a copy of the above mentioned letter.) [298]

“Mackay, Idaho, April 28, 1910.

Hon. D. G. Martin,
State Engineer,
Boise, Idaho.

Dear Sir:

Your letter of April 25th at hand.

I have seen the Tunnel on the Blaine Canal and know the conditions existing there. I understand from your letter that the matter of this tunnel and the clearing of the reservoir site, and the concrete facing on the dam, are all to remain for the present as they are.

I have a copy of Mr. Fell's last report and shall be able to give you any desired information on short notice.

Mr. Carhart was to send me a small map of the Big Lost River project. As I have not received it I thought perhaps it might have been overlooked in his crowding work. The map will be of great help to me and I should like to get it as soon as convenient.

(Testimony of Paul S. Roberts.)

I am leaving today for Blackfoot where I join Mr. Fell to go over the American Falls project.

Am sending under separate cover a report on this project.

Respectfully,

PSR—m

Carey Act Inspector."

Mr. HENDERSON.—That is all I think of now, but there are some other reports here that I want to read, and I would like to recall this witness, if I could, in the morning again. It is now eleven o'clock. (577.) [299]

Redirect Examination.

(By Mr. MILLER.)

Those parts of the work that had been constructed and completed while my predecessor was on the job and before I came, I did not consider within my province to compare with the specifications, or to pass on their sufficiency. I had no general authority to stop work, but only to report to my superior. When, April 24, 1910, I considered the outlet of the tunnel good, that was before I discovered the vibration. The spillway tunnel was 12 or 14 feet high, not counting the concrete lining. The Antelope Creek crossing was completed before I went on the job at all. I suppose my predecessor reported on that. Drummond did not show me any of the detailed specifications for this work, either approved or unapproved. I tried from time to time to get them from him. When I reported that they had excavated the firm foundation for the core-wall at the place

(Testimony of Paul S. Roberts.)

where the sheet piling was, they had gone to pack gravel. That has nothing to do with imperviousness. The place where I spoke of Drummond omitting the sheet piling was on the Rock Cliff end of the core-wall. When I said in one report that the work in general was O. K. I did not take into consideration any part of the structure completed and passed on by my predecessor. When I said the sheet piling was driven according to plans and specifications, I meant that that I saw driven over near the Rock Cliff. When I said that on May 27th I did not know of any previous dumping from a diagonal track, I did not refer to the diagonal track following the left bank from which dumping was done while my predecessor was on the job. I made no comments in my reports on puddling which was done or omitted prior to [300] my going there. Mr. Martin expressed a great reluctance to establishing a precedent by requiring work done under his predecessor to be torn out. I did not say that prior to June 28th all work on the dam was done according to the plans and specifications. I didn't intend to make any such statement. I made a rough estimate of the dumping from diagonal tracks—about 10,000 yards.

Report of Roberts dated August 27, 1910.

Reports that the concrete work in the head-gate of the Blaine Canal is for the most part very good. In Drop No. 5 there is no cut-off wall at the upper end of the drop. At the siphon carrying the waters of Antelope Creek beneath the canal, the gravel is banked up. Construction must be changed. At the

(Testimony of Paul S. Roberts.)

tunnel end of the Blaine Canal the waters have eroded the banks of the portals. Much caving has taken place. Retaining wall must be built. All excavation and embankments on the entire system is exceedingly well done with the exception of a few places of faulty concrete work as noted in the previous report. The structures as now completed are well built.

I think I made no later report than August 27, 1910. [301]

At 9:30 A. M., Friday, April 12, 1910, the hearing was resumed pursuant to adjournment.

PAUL S. ROBERTS, a witness heretofore duly called and sworn, upon being recalled, testified as follows, on

Recross-examination (Continued).

(By Mr. HENDERSON.)

Q. Mr. Roberts, did you, on August 27, 1910, as Carey Act Inspector for the State of Idaho, make a report to the State Engineer?

A. I believe I did; yes, sir.

Q. Just look at that paper (handing paper to witness). A. I believe that is mine, yes, sir.

Mr. HENDERSON.—Now, this can't be marked, gentlemen, because it is an official record, is my understanding.

Mr. MILLER.—What is the date of that?

Mr. HENDERSON.—August 27, 1910. Now, I would like to have that marked as an exhibit, but not marked on here, and then let the reporter make a copy of it.

(Testimony of Paul S. Roberts.)

Mr. HAGA.—Where did you get this, Judge?

Mr. HENDERSON.—I got it from the reporter here. I offer that as an exhibit.

(The following is a copy of the above-mentioned report):

“Sept. 9th, 1910.

Heber Q. Hale,

Register, State Land Board,

Boise, Idaho.

Sir:

I beg herewith to submit to you Carey Act inspection report and general conditions report on the Pratt Irrigation Company by Mr. G. W. Fell, Carey Act Inspector, also general conditions report of the Big Lost River Land & Irrigation Company by Mr. (583) [302] Paul S. Roberts, and general conditions report on the work on Jerome dam by Mr. J. M. Burkett, Carey Act Inspector.

Yours truly,

State Engineer.

By _____.”

Enc-Reports.

C/V.

Same to Miss S. Belle Chamberlain, Sup. Pub. Ins.

“ “ Hon. D. C. McDougall, Attorney General.

“ “ Hon. R. S. Lansdon, Secretary of State.

“ “ Hon. James H. Brady, Governor.

(Testimony of Paul S. Roberts.)

BIG LOST RIVER LAND & IRRIGATION CO.

Mackay, Idaho, August 27, 1910.

Hon. D. G. Martin,
State Engineer,
Boise, Idaho.

Sir:

Having just completed a trip over the canal and lateral system of this project, I beg leave to submit the following report:

On August 23d, I joined Mr. James McMillan and we began our investigations at the head-gate of the Blaine Canal at the diversion dam above Darlington. The jacks which operate the gates at this head-gate are still installed on the temporary timbers over the gates. All the drops in this canal, nine in number, are finished. The concrete work is for the most part very good. At drop number five there is no evidence of any cut-off wall at the upper end of the drop. At the syphon, which carries the waters of Antelope Creek beneath the canal, considerable gravel has banked up at the intake end of the syphon. It will be necessary to construct a concrete apron on the bottom of [303] the creek extending from the opening of the syphon back up the creek a sufficient distance to prevent gravel and earth from (584.) washing down and clogging the mouth of the syphon.

At the tunnel of the Blaine Canal the waters in the canal have eroded the banks of the portal at the lower end of the tunnel to such an extent that considerable caving has taken place. A retaining wall will have to be built at this point on both sides of the portal to

(Testimony of Paul S. Roberts.)

prevent further erosion, or the batter will have to be increased to prevent caving.

All other structures on the lower Blaine canal and on the Era tract are in the same condition as reported in my report on July 30th.

On the Powell tract, all structures are the same as reported in report above noted, with the exception of the head-gate for the north canal at the diversion dam below Powell. The concrete work for this gate is completed. View No. 1 shows this concrete work from the river side.

View No. 2 is a view of the canal side of this same gate. This concrete work is well finished in a workmanlike manner.

View No. 3 shows two of the three tainter gates at the site ready to be installed.

View No. 4 is a view of the downstream face of the diversion dam. The concrete facing of this dam has been worn by the water to such an extent that in places the rocks of the dam have been laid bare. View No. 5 shows the upstream face of the same dam. I am informed that it is the intention of the company to rebuild this dam and to continue it 6 feet above its present top to the level of the top of the concrete of the gates of both the North and South canals. View No. 6 shows the upstream face of the head-gate for the South canal at this same [304] diversion dam. This view shows the wooden gates as now in use at this head-gate. (585.)

With the exception of the above concrete work at the head-gates of the north canal on the Powell tract,

(Testimony of Paul S. Roberts.)

all structures on this tract are in the condition as reported in report of July 30th. The excavation for canals and laterals on the Powell tract has been completed. Openings in the banks have been left for concrete head-gates and all excavations for drops in the main canals have been completed ready for the forms for the concrete work. There is no concrete work finished on any of the structures below drop number five of the north canal as noted in last report.

All excavation and embankment on the entire system is exceedingly well done. With the exception of a few cases of faulty concrete work, as noted in previous reports, the structures which are now completed are well built. At the present time there is no work being done at any point on the entire project.

Respectfully submitted,

PAUL S. ROBERTS,

Carey Act Inspector.

(Stamped on back:)

“Office of THE STATE ENGINEER.

INDEX NO. 010.017.

C. A. E.”

Mr. HENDERSON.—Q. Mr. Roberts, did you make any later report than this report of August 27, 1910, on the Big Lost River Irrigation project?

A. I think not, that is, embracing the entire project. I might have made some reports concerning certain phases of it, perhaps, but I wouldn't be sure of that from memory. [305]

Q. But you have no recollection of even doing that?

A. Well, I was in correspondence with the state

(Testimony of Paul S. Roberts.)

engineer (586.) about various matters, but not in the nature of so-called reports, as I designated them.

Mr. HENDERSON.—That is all.

Mr. MILLER.—I think that is all. [306]

[Testimony of Samuel Storrow, for Defendants.]

Further Cross-examination of SAMUEL STORROW.

SAMUEL STORROW, being examined by Mr. Henderson, testified as follows:

I was at the Mackay dam in the latter part of June to the middle of July, 1911. When I was at the dam, it was partially completed and there was still more to be done. The dam was six hundred feet broad at the base. It was approximately two thousand feet long. The highest work done at that time was probably 115 or 120 feet above the lowest point. (589.)

Mr. HENDERSON.—Q. In Mr. Riley's letter to you, dated June 13, 1911, he asks you to make a report, to outline a design and estimate of cost of design advised by me for completing the Mackay dam, canals and principal laterals. Did you make that report?

A. As you read the letter there you forget that that letter is written by me to Mr. Riley, and accepted by Mr. Riley.

Q. Then your letter to Mr. Riley—

A. I made the report as stated in that letter.

Q. Now, did you tell him in your report how that dam could be completed?

A. I believe I did, sir.

(Testimony of Samuel Storrow.)

Q. Did you estimate what it would cost to complete it? A. Yes, sir.

Q. What was your estimate?

Mr. POWELL.—Objected to as immaterial and irrelevant. (591.)

A. Quoting from memory, \$675,000.00, but I qualified that estimate by describing certain changes which I thought it was necessary to make on account of the bad work already done. [307]

Q. You have that report in court, have you not?

A. I have.

Q. Will you look at that report and see what your estimate was? A. No, sir.

Q. You will not? Don't you know that to be wrong? A. No, sir.

Q. Don't you know that your report was \$550,000.00? A. No, sir.

Q. Will you say it wasn't?

A. I say that it may have been so written once, but it was corrected if so written. My report was \$650,000 as I now remember it. I am testifying from memory.

Q. In that report, didn't you say that the material that was already in the dam could be used by putting a blanket over the front of it?

A. But also saying that certain other things should be done.

Q. What other thing did you recommend?

Mr. POWELL.—Objected to as immaterial, and not cross-examination, and irrelevant.

Mr. RUICK.—The proposition is that this was a

(Testimony of Samuel Storrow.)

private report made to his employers, and therefore confidential, and not the proper subject for examination or cross-examination, and not an issue in this case.

Mr. HENDERSON.—If he has made any different kind of report, I have a right to find out.

Mr. MILLER.—That is not the proper way to impeach a witness, as I presume you know.

Mr. HENDERSON.—Answer my question. (592.)

A. I told Mr. Riley, either verbally or in the report, that the work which it would be necessary to do at the Mackay dam [308] in order to make a serviceable dam of it was divided into two lines, one—

Q. Will you get your report and read from it?

A. No, I decline to.

Q. You are now testifying from your recollection?

A. I am testifying to what is in the report.

Q. All right; go ahead.

A. I told Mr. Riley that there were two ways of completing that dam; one was to do the least work which would make the least dam that we would dare build, and that, having built that in that way, he would then have a dam which would undoubtedly cost him more money as time went on for repairs and additional work and so forth; and I stated that in building the dam in that way it would be necessary to provide an impervious barrier to the water, which was utterly lacking in the dam as then partially completed, and that that might be furnished by building a somewhat new type of dam on the front or upstream side of the present structure, separate there-

(Testimony of Samuel Storrow.)

from, but connecting therewith by leaning against it; in other words, that an entirely new impervious barrier must be furnished, and that, if that were done, this new impervious barrier were furnished, then the existing material might be used to add to the physical strength, to restrain the thrust of the water, but not its percolating power. I further suggested to Mr. Riley that on account of the fact that the work on the dam as already completed was defective, in my opinion he had better leave that site altogether and go to a new site, merely because it was cheaper in the long run; I don't mean cheaper the first day, of course, but cheaper in the long run to build a new dam rather than to rework an old one and not know just what he had done or had on his hands, rather than rework it. (593.)

Q. What was your estimate on the new dam?
[309]

Mr. POWELL.—The same objection—not cross-examination and immaterial.

A. I have forgotten the exact figures. The first cost is higher than the cost of repairing the Corey dam, but, as I have just told you, I advised Mr. Riley that the ultimate cost would be less, although the first cost would be a little more, that is, the apparent first cost.

Q. You have that report in court in front of you. Will you state what your reported to Mr. Riley the new dam would cost.

A. I do not have that report in front of me.

Q. It is on the table, isn't it?

(Testimony of Samuel Storrow.)

A. I do not know; I am not looking at the table; I am looking at you.

Q. I will ask you to look at the table.

A. That is not my copy of my report. That belongs to counsel; that is not my copy.

Q. But you know that a copy of your report is here? A. Yes, sir.

Q. How much was the difference between building the new dam and the cost of repairing or fixing up the old dam?

Mr. POWELL.—The same objection.

A. I do not know what it would ultimately come to.

Q. Will you look at your report and see?

A. The report does not state.

Q. It does not? A. It does not.

Q. Did you report to Mr. Riley in writing as follows: "In order to complete the present dam at the present site, the procedure advised by me is as follows: 1st. Build a blanket of a fine material containing as much gravel as will (594.) still [310] further increase its imperviousness, placed on the water face of the present dam and connected by a deep trench to deep foundations so that any water which passes the line of the dam will be forced through a deep and safe path well below the body of the fill. This whole structure then being surfaced on the water face with a mattress of heavy gravel or rock built to withstand wave action."

A. I have already just testified to you that I did so report, or words to that effect. I wish to qualify that slightly by saying that my report included a

(Testimony of Samuel Storrow.)

number of other things with reference to construction without which your quotation, or whatever that is, the piece you have just read, is not complete, and does not express the real full meaning of my report to Mr. Riley at all.

Q. Did you further report: "The procedure for this design is to build a dike across the stream bed upstream from the present dam, so as to give access to the proposed trench, then to cut this trench by a steam shovel along the whole 2,000 feet of the face of the dam, cutting to such depth, not less than 20 feet, as the finding of the cutting itself may show necessary; the material so excavated to be used for filling in the body of the dam itself. At the same time, the present concrete face of the dam will be stripped off. When the proper time comes, after the trench has been fully excavated, it will be sluiced full of fine material washed out of the body of the present and accumulated fill. Thus the dam will be changed from its present design by the addition of a great blanket of strong and impervious material on its upstream face." Did you so report?

A. That is part of the report which I have just testified I made. It is explanatory of what I have just told you, and, taken by itself, it utterly misstates the tenor of my report. (595.) [311]

Q. But you decline to furnish it?

A. I decline because it contains confidential matters entirely distinct from construction, matters of finance and matters of credit, and matters which I do not consider in any way pertinent to this contro-

(Testimony of Samuel Storrow.)

versy, and all strictly confidential.

Q. Did you further report on this dam: "It will be necessary to effect a very secure bond between the body of the fill of the dam and the limestone cliff on the right bank. This is a simple matter and consists of merely excavating a proper cut into the bank with proper slopes of sides and back and refilling this cut with properly puddled material." Did you so report?

A. With the qualifications which I have stated, yes, sir.

Q. (Reading.) "Other detailed additions are necessary such as the building of a new spillway on the north of the dam, which will be a somewhat difficult and expensive structure, because it must cross the soft and friable cone of Cedar Creek and must be built of the elsewhere mentioned capacity of 10,000 second-feet." Did you so report, Mr. Riley?

A. With the qualifications I have just stated, yes, sir.

Q. (Reading:) "It will be necessary to rebuild the inlet of the tunnel passing water through the dam. This inlet is dangerously close to the present face of the dam and will be completely covered by the proposed blanket. It should be rebuilt by extending the main line of the tunnel to emerge from the rocky cliff well to the south of the dam and a gate tower should be built preferably as a shaft in or against the cliff. The gates themselves should be placed in the base of this tower and should be of sufficient capacity to give a maximum discharge to the tunnel." Did

(Testimony of Samuel Storrow.)

you so report? (596.)

A. With all the qualifications of my previous answers, that that is a partial statement, and the other qualifications, yes, sir. [312]

Q. (Reading:) "After all this has been done and the water is allowed to accumulate in the reservoir, I anticipate that a considerable amount of the water in the reservoir will sink into the cone of Cedar Creek to reappear again above the lower dam site at the narrows. It is probable that this leakage will be of considerable volume, but if the above suggestion has been liberally carried out, it is at once unlikely that the leakage be dangerous and certain that this leakage can be artificially reduced, and will reduce itself naturally, as time goes on and the floor of the reservoir becomes covered with mud and fine slimes." Did you so report?

A. Trusting to my memory, and with the qualifications previously given, yes, sir.

Q. (Reading:) "After the entire dam has been finished it will, in my opinion, represent a merchantable dam." Did you so report?

A. That is my recollection, with the qualifications previously given.

Q. And in that report didn't you make a report how many cubic yards would have to be moved and how much it would cost?

A. I believe so, sir.

Q. (Reading:) "Contents of the Mackay dam. Completed dam as originally designed would contain 953,152 cubic yards. Fill placed in structure prior

(Testimony of Samuel Storrow.)

to July 1, 1911, 444,176 cubic yards. Fill to be placed, 508,976 cubic yards. Replacement of excavation, 5,233 cubic yards. Total fill to be placed, 515,209 cubic yards. To this amount of fill it will be necessary to add the blanket above described which is estimated (597) to contain 250,000 cubic yards. It will also be necessary to excavate and back fill the trench above described, a distinctly difficult and expensive operation. The following estimate of cost is given, based on the present incomplete surveys:
[313]

TO COMPLETE PRESENT MACKAY DAM.

Fill necessary to complete original design

510,000 cubic yds. at 25¢.....\$122,500.

Blanket on face

250,000 cubic yds. at 25¢..... 62,500.

Excavation "in the wet"..... 100,000.

Facing of dam..... 50,000.

Spillway..... 30,000.

Tunnel, tower and gates.... 35,000.

Contingencies..... 100,000.

(Total).....\$500,000."

Is that correct?

A. You don't expect me to carry those figures in my head, do you?

Q. Well, total, \$500,000?

A. That part is not true, because you have only quoted part of the report.

Mr. MILLER.—Counsel is not correctly reading from the report.

(Testimony of Samuel Storrow.)

Mr. HENDERSON.—I haven't got the report.

Mr. MILLER.—Well, you have got a copy of a part of it and are making certain omissions, and you are not correctly reading right now.

Mr. HENDERSON.—Will you show the report?

Mr. MILLER.—No, we won't show it. We prefer to have you go right on misreading it.

Mr. HENDERSON.—Q. (Reading:) "Engineering and Superintendence, \$50,000. Total cost to complete present dam, (598) \$550,000." Did you make those figures?

A. Those figures are not correct. That is not my report to Mr. Riley of the cost of completing the dam.

Q. I didn't ask you if that was your report. Did you make a [314] report to Mr. Riley that the present dam could be completed for \$550,000?

A. If I did, I corrected it afterwards. My impression is that I did not, and, quoting from memory, I am willing to say I did not.

Q. Did you make a report to Mr. Riley for a reservoir at the narrows?

Mr. RUICK.—Do you mean a reservoir, or a dam for a reservoir?

Mr. HENDERSON.—Reservoir site at the narrows?

A. Dam site or reservoir site?

Q. I am asking you—the words I mentioned—reservoir site at the narrows—did you make a report on that?

A. I think that is sufficiently close. What I intended to mean, and what I did mean was a reservoir

(Testimony of Samuel Storrow.)

site extending down to the narrows, with a dam built at the narrows.

Q. And did you estimate the cost of that to be \$675,000?

A. That estimate was made at that time and afterwards raised.

Q. Will you answer my question?

A. I have answered your question.

Q. Did you make an estimate of \$675,000, at any time?

Mr. MILLER.—He has answered it already.

WITNESS.—I repeat the answer made last time.

Mr. HENDERSON.—Q. That is all the answer you desire to give?

A. That is all I answer. (599.) [315]

Redirect Examination.

(By Mr. MILLER.)

These pits, one on each side of the core-wall, I had dug, were within three feet of the core-wall. When I went to the bottom I thrust a crow bar or drill bar through the material, toward the core-wall, a considerably greater distance than three feet, and found no resistance. I know that I was then below the core-wall. The pits were below the core-wall, but how far, I don't know. When I said that I reported to Mr. Riley, that the dam could not be completed and be safe, I meant that in view of the defective construction the dam could not be completed on its original lines. The time that I was at the dam the highest part of the crest was 15 or 20 feet below its finished height. Some parts along the

(Testimony of Samuel Storrow.)

center line were not more than 20 or 30 feet above the native ground and some were less.

The report which I first made to Mr. Riley regarding the cost of working over the present dam and building a new dam was amended and changed several times.

Trust deed offered in evidence as Exhibit 66.

[Testimony of C. B. Hurtt, for Defendants.]

C. B. HURTT, being recalled, testified as follows:

I have made computations from the record of the Big Lost River Irrigation Company as to the total amount of money of the contract for the sale of water right by that company to settlers, to date. I have not figured the number of the contracts. The amount of the contracts deposited with the trustee averaged \$36 an acre. The total acreage sold was 62,201.37 acres. That includes the water rights sold by the predecessors in interest to the Big Lost River Irrigation Company. Both the sales and water contracts deposited with the trustee are \$1,836,816.27; water [316] contracts collateral on the Bradford & Starr note, \$101,851.92; water contracts with the approval of the State Land Board, \$11,480; total, \$1,960,148.19. None of the money on those contracts deposited with the trustee has been paid except \$4 per acre cash paid when the sale was made. That was paid to the Big Lost River Irrigation Company and not turned over to the trustee.

Of all the money received from the bonds of the Big Lost River Irrigation Company, except that that has not been accounted for by Trowbridge & Niver

(Testimony of C. B. Hurtt.)

Company, the balance has all gone in payment to Corey Bros. Construction Company and other expenses. All of the money paid to Corey Bros. came from the bonds. I have here a certificate of incorporation of the Lost River Water Company. That was incorporated pursuant to the Speer contract with the State. I have produced here three forms of water contracts which were used. We had one for the Carey Act land, another for homestead and desert lands, and a third for patented lands, private lands. They were all, however, for the sale of water rights and were approved by the State Land Board, and all three forms were actually used.

(The three offered in evidence.)

The stock of the Lost River Water Company was issued on the basis of a share per acre. The certificate was attached to the water contract signed by the purchaser, and was sent to the trustee attached to the water contract. Those certificates are now held by the trustee, are signed in blank by the purchaser, and deposited with the trustees pursuant to the contract with the State, and pursuant to the trust deed. Those certificates are of 62,000 shares, a share per acre. The Big Lost River Irrigation Company did not receive cash for its stock, but received the rights, and franchises of the old [317] company and acquired by Speer. All the moneys received by the Big Lost River Irrigation Company was by the sale of its bonds and water rights and that has all gone into the project except the \$200,000 of bonds which Trowbridge & Niver Company failed to account for.

(Testimony of C. B. Hurtt.)

I won't say that the Big Lost River Irrigation Company has any property outside of the project and the water contracts. It has about \$300,000 debts outside of that involved in this suit. It is unsecured. The company is insolvent. My recollection is that \$1,378,500 bonds has been issued on the first mortgage, and under the second trust deed \$200,000. They are all outstanding. Part of the interest was paid last July 1, 1910, under the first trust deed. No interest to my knowledge has been paid on that debt since July 1, 1910, nor under the second trust deed. Interest is in default on both. I think the trust deed was executed August 27, 1909.

Articles of Incorporation of the Lost River Water Company, introduced as Exhibit 80.

The principal sales of water rights consisted of the right for Carey Act lands—between 90 and 95 per cent. [318]

[Testimony of G. H. Speer, for Defendants.]

Direct Examination of G. S. SPEER, Witness for Defendants.

(By Mr. MILLER.)

My name is G. S. Speer. I am vice-president of the Trowbridge and Niver Co., bond dealers. I live at Oak Park, Illinois. I have been connected with said concern about twelve (12) years. I was away from the firm about two (2) years. I was vice-president of the company at the time of the inception of the Big Lost River Irrigation project. My first connection with that project was a telegram from Mr. Rosecrans at Boise, approximately the first of Feb-

(Testimony of G. H. Speer.)

ruary, saying that the proposition had been presented through Clinton, Hurtt & Co., and asking me to come and look at it. I went to Boise on the evening train. Mr. Rosecrans met me at Pocatello, and we went out and examined the property. After examining the property we went back to Boise and there met Mr. Ruick, who was the attorney who had brought the proposition to Clinton, Hurtt & Co. He had secured an option from Thomas & Barnham, who had taken the matter up with Clinton, Hurtt & Co., and they mentioned it to Rosecrans and Rosecrans wired me and I went out there. Thomas & Barnham were the principal stockholders and officers of the old company. I do not remember the name of the old company. It had done about \$70,000.00 or \$80,000.00 worth of work, and they had contracts for water rights amounting to about \$360,000.00. We entered into a tentative agreement to acquire the rights of the old company, conditioned upon our being able to get a renewal of their contract with the State and advance in the price of water to \$40.00 an acre. At the time their maximum price was \$35.00 per acre. In making that contract, I was acting for Trowbridge and Niver Co. Later the matter was taken [319] up with the State Land Board and they promised to co-operate. It was several months before the contract was actually consummated. In the meantime, we negotiated with the creditors of the old company, so as to get the things cleaned up and take over and handle it. All of my dealings in this matter were on behalf of Trowbridge & Niver Co. I first met Mr.

(Testimony of G. H. Speer.)

W. W. Corey, President of Corey Brothers Construction Co., in relation to this matter, in Denver, where he came with a number of other contractors to bid on construction work on the Denver project in spring, 1909. Trowbridge & Niver Co. financed the Denver Reservoir Irrigation project, selling the bonds. This was about April 1st, 1909. Mr. Corey was a bidder and seemed disappointed that he did not get any of that work. Mr. Rosecrans and I were going on to Boise again on the Lost River project and mentioned that to him and told him there was another chance for him to do some work, and his outfit being at that time up in Canada, it was a little more convenient for him, also nearer to Ogden, his home and place of business; and when we were through at Denver and started for Boise, Mr. Corey went with us. On our way to Boise, Mr. Rosecrans and I had several talks with Mr. Corey. Practically all day and two evenings. We left Denver in the evening, which brought us to Boise the second morning. Mr. Rosecrans and I had a drawing-room and Mr. Corey, if I remember, had a berth near us, and, of course, he spent most of the day in the drawing-room with us talking these things over and our plans for handling the Lost River and the way things could be done. We talked practically all day about the condition of the project and other matters. I went over the whole thing as to the way this thing came up; and I as vice-president of Trowbridge & Niver Co. had taken it over in my own name because we did not want to have the name [320] of Trowbridge & Niver Co. tied

(Testimony of G. H. Speer.)

up in it. At the same time we wanted to have it in the name of someone representing the company where any money that we advanced would be properly protected, and as soon as we could get obligations paid off or adjusted, we proposed to organize a new company, the name of which had not yet been determined. We wanted to take advantage of the favorable weather in the summer months for the construction work; that Trowbridge & Niver Co. as soon as the engineers had gotten the project ready for the construction work would advance whatever money was necessary for the construction work done by him until such time, and be responsible to him until such time as a new company was incorporated and a formal contract entered into. I also explained to him the condition of the old company—the amount of water contracts they had outstanding and that Trowbridge and Niver Co. had hypothecated those contracts with the banks and had advanced some \$40,000, or \$50,000 on the proposition, most of which would be used in paying these old obligations and cleaning up things so that we could transfer to a new corporation safely; and that if he took the work we would want him to move slowly or at our direction to govern the amount of work done by the amount of money which we found we could pay until the new company was incorporated and Clinton, Hurtt & Co. could have a Carey Act opening and sell water rights and thereby secure additional water contracts to be used as collateral to a bond issue. I explained to him what the bond issue was to be used

(Testimony of G. H. Speer.)

for; that before the bonds could be issued we would have to have those water contracts, and because Trowbridge & Niver Co. did not want to tie up too much of their working capital in the project, we would want him to go slow on the construction work, or as we directed until such time as we could get plenty of bonds. I told him that after they had the opening and the bonds available, he could then go as fast as he [321] liked because we could sell the bonds and get money faster than he could spend it, but until that time he would have to go slow. He said that would be satisfactory, but while he was not a rich man he had quite a balance coming from other work and if it became necessary he might carry a part of it for a while.

He mentioned the Calgary work and that he had not gotten his final estimate. At that time there were no funds available or in prospect for the construction of this system, except the proceeds of the sale of the bonds and except what Trowbridge & Niver Co. would advance. I explained that fact to Mr. Corey and that the amount of money we could furnish would depend upon the condition of the bond market, and how things worked at Denver; that if there was a slowing up of the bond market, they might there call on us for some advances, and we would then be unable to put any large amount of money into the Lost River, but if the Denver parties were able to supply plenty of bonds to meet their needs, Trowbridge & Niver Co. would then be able to put more money into Lost River; that he would have to

(Testimony of G. H. Speer.)

co-operate with us and regulate the amount of work he would do from month to month, depending upon our condition. I am now stating the substance of my conversation with Mr. Corey. We had that same understanding with the other people who were interested. The engineering was done by the Arnold Company. I told him the Arnold Co. would be the engineers in charge, and Mr. Rosecrans, being their chief hydraulic engineer, would be the man in charge of the work. I do not recall positively whether I told him the Arnold Co. would have to wait until the bonds were sold before they got their money. It is likely that I did, [322] because it was understood with both Rosecrans and Mr. Arnold that the work would have to go as slow as necessary, depending upon our condition, and until such time as they had the Carey Act opening, and could get plenty of bonds. Mr. Corey soon after went to see the project and submitted his bid along with two or three other companies. I was present when Mr. Corey's bid was accepted orally in Boise. His outfit was moved on the ground to begin work the latter part of May. I do not know the exact date. I know he was anxious to get his outfit from Canada and wanted to move onto the work earlier than we would permit. I had not completed my contracts with the State and I had not yet been able to adjust all of our claims with some of the parties in Salt Lake, who had claims against the old company and we did not want the work started and have it become known that we were in the proposition until this contract with

(Testimony of G. H. Speer.)

the State had been ratified, or until we had settled with these people, because I expected to get better terms from them than I would be able to get after they knew that Trowbridge & Niver Co. were back of the project, and we had actually started work.

I have no recollection of being present in Boise about the first of June when the completed contract (excepting signatures) was delivered to Mr. Corey.

In my conversation with Mr. Corey on the train I told him that Trowbridge & Niver Co. were to negotiate the sale of these bonds; that Clinton, Hurtt & Co. of Boise were to sell land and water rights. I told him I had the organization completed except the incorporation of the company. It was understood that Mr. Hurtt was to be president of the [323] company when it was formed. I don't recall stating that to Mr. Corey at that time, but he was with us in Clinton, Hurtt & Co.'s office where we all talked the situation over. The Big Lost River Irrigation Co. of Idaho was organized in every particular pursuant to the plan which I laid down to Mr. Corey. I carried out the plan of operation as outlined to Mr. Corey. Under my contract with the State I was to organize a water company to take over this system. In all Carey Act propositions you have a water company and a contracting or construction company, which in this instance was the Big Lost River Irrigation Co. I had made the contract personally with the State Land Board, and when the company was incorporated, it took my place. The water company was a mutual subsidiary company of the Lost River

(Testimony of G. H. Speer.)

Co. All title to the water rights would be in that company. If a man bought 160 acres of land, he would get 160 shares of stock, which represent 160/1000 of the whole system, so that when the water rights were sold out and paid for, the Lost River Co. would be out of business, and the water company would own and operate the project, and the stock would be owned by the farmers. That system of doing things was explained to Mr. Corey. It was practically the same as the situation at Denver. The Denver Reservoir Irrigation Co. was doing the same thing as the Big Lost River Co. The plan was outlined and that was subsequently just the way things were worked out. There was an opening under the Carey Act. The only deviation from the plan as outlined to Mr. Corey was that we had expected to have an opening earlier than it actually occurred. We wanted Clinton, Hurtt & Co. to have the opening on June 1st, but they were delayed by other projects, and thought the time was too short to properly advertise, and have a big opening; that June 1st was not a good time to [324] get eastern farmers to come west on account of being busy with their crops, and they recommended postponement until sometime in September or October, and that was done. I think Mr. W. W. Corey was there. The opening was held in Arco. The money that was paid to Corey Brothers Construction Co. at the beginning of the work was advanced by Trowbridge & Niver Co. I think the first money he got from the purchase of bonds was paid the 10th of October, and from that time on

(Testimony of G. H. Speer.)

it all came from the Lost River bonds, and Trowbridge and Niver Co. were reimbursed for its advances made to the Corey Brothers Construction Co. from the sale of bonds. The estimates upon which Trowbridge & Niver Co. made payments to Corey Brothers Construction Co. were based on the report of the field engineer, who would measure up the work and report to the Chicago office. In all of these transactions I was acting on behalf of Trowbridge & Niver Co.

I do not recall whether I had any conversation during June and July with Mr. Corey, President of Corey Brothers Construction Co. I probably did because I spent a great deal of my time in Idaho that summer and met him frequently either at the Lost River work or at the hotel in Boise.

Cross-examination.

(By Mr. HENDERSON.)

I think McArthur Brothers and Maney Brothers bid on this work. I do not think Corey Brothers Construction Co. was the lowest bid. As I recall it, Corey's bid was lower in some things and higher in others, but the average of the bid as figured out by Mr. Rosecrans was about the same, but because of our talk and getting acquainted with Mr. Corey and his statement concerning his outfit and the work that he had [325] done and what he could do and his willingness to co-operate with us and fit into this plan and adjust himself to our conditions, and the bids being approximately the same—I could not say positively, but I think Mr. Corey's bid averaged just a

(Testimony of G. H. Speer.)

little bit higher than one of the other bids; and Mr. Rosecrans recommended that we give the contract to Mr. Corey, and we told him we would give him the work. I don't recall the exact figures nor the price at which the bids were put in, but as I remember, Mr. Rosecrans figured it out and said that Mr. Corey's bid would average about as good as the others and recommended that we let him have the work. If his bid had been very much higher than the other two, he would not have obtained the work. At times we had advanced money to the Denver proposition for which we had not sold any bonds. Sometimes they would get the bonds just a day or two before the monthly estimates would come in and Trowbridge & Niver Co. would advance the money. We were financing the Denver proposition the same as the Big Lost River proposition. I explained that to Mr. Corey. They were not quite the same. The Denver proposition had already been started and there was not to be any Carey opening. That was simply a question of how fast they could sell their water rights. I did not explain the matter to the other bidders. If their bids had been much lower than Mr. Corey's, and we had wanted to give them the work, I would then, of course, have explained it to them. We did not go into any detail about the Carey Act with them. There was no occasion for it. The reason I went into this matter with Mr. Corey was *was* partly on account of his disappointment at Denver and his apparent anxiety to get the work. As I say he rode on the train there and we got ac-

(Testimony of G. H. Speer.)

quainted with [326] him. I didn't know the other men as well as I knew Mr. Corey, at the end of that trip, and the bids had not yet been received. At this time there was no Lost River Co. to make a contract, and Trowbridge & Niver would not want to make a contract without explaining all the circumstances. I do not remember the exact date when I rode from Denver to Boise with Mr. Corey; that was about the first of April, 1909. Mr. Corey may not have bid on the work personally, but he was in with some of those people. I think he put in bids through Rosser & Whittaker. I am sure that he was a party in a bid. I do not recall the train on which we left Denver, either 7:05 or 10 o'clock P. M. I do not recall positively whether Mr. Corey got off at Green River, Wyoming, about ten o'clock the next morning. It is possible that he did get off and went down to Ogden, and joined us again the next day or so at Boise. When I took hold of this proposition there had been practically no work done on the Lost River dam. The company known as the Big Lost River Irrigation Co. did practically all of that work. A little bit of work had been done there by the old company, but it did not amount to anything. It was just enough to hold their rights. Our company did not lay out the plans for the dam. This was done by the Arnold Engineering Co. Trowbridge & Niver Co. had nothing to do with such things. The plans were drawn by Arnold & Co. after I had acquired the project, and the work that was done was done under those plans. Probably a few hundred dollars' worth

(Testimony of G. H. Speer.)

of work had been done by the old company, but all the rest was done by the Big Lost River Irrigation Co. The first bonds of the Big Lost River Irrigation Co. were sold [327] by Trowbridge & Niver Co. the latter part of September or the first of October, 1909. I can find out exactly from the books. I will look up the date of the sale of the first bond. I will also find out the date of the last sale of bonds and how much the bond sales all amounted to.

The stock of the Big Lost River Irrigation Co. was all temporarily issued to me. I do not recall how many shares were issued to me. I do not think I can tell from any of our books the number of shares that were issued to me. I do not think we have the records here. The stock that was issued to me belonged to Trowbridge & Niver Co. and their associates. The date of the first sale of Big Lost River bonds, I have just learned over the telephone from my office, was made September 10, 1909. I did not get the total amount. The trust deed was already prepared and they used water contracts that were obtained by the old company as collateral to those bonds. During the month of September we sold approximately \$300,000.00 worth of bonds, and the last bonds were sold June 23, 1910. Altogether, I think we sold about \$1,350,000.00. I do not know how much money we have turned over to the Big Lost River Irrigation Co. I will look it up and find out. I find the bonds are dated July 1st, 1909, maturing from 1915 to 1923. The trust deed was dated July 1st, 1909, and recorded August 27, 1909. The first deliveries of bonds were

(Testimony of G. H. Speer.)

made September 10, 1909. We delivered \$49,600. The orders had been taken from 30 to 60 days before that. The last bonds sold by our company for which we received money was, I believe, June 23, 1910. I do not know the exact amount of bonds sold on the 23d day of June, 1910.

I find that prior to September 10, 1909, Trowbridge & Niver Co. had advanced the Big Lost River Irrigation Co. \$209,516.00 [328] on the 11th of September, \$88,801.00. They delivered \$49,600 of bonds September 10th. The total sales in September were 301,000. I do not know the exact amount of money we have turned over to the Big Lost River Irrigation Co. I think approximately \$900,000.00 or \$910,000.00. There is due from Trowbridge & Niver Co. to the Big Lost River Irrigation Co. in gross \$164,000.00; net \$96,000.00. By gross and net I mean that there were different arrangements made. The last agreement was with the Western Mortgage & Loan Company, which then held all of the stock of the Lost River Co. They were anxious to push the work through to completion, so that water would be delivered on all of the land by May 1st, 1910. They made an arrangement with Trowbridge & Niver Co. which amounted to their offering a bonus, and if Trowbridge & Niver Co. would sell the two million within a certain length time, they were to have a special discount of five per cent, and if Trowbridge & Niver Co. sold all the bonds delivered to them, but did not sell the two million, they were still entitled to that discount. We sold all the bonds delivered

(Testimony of G. H. Speer.)

to us, and we, therefore, would be entitled to the discount, which would give us about \$68,000.00 more, which would make about \$96,000.00 net which we still owed the company. The Western Mortgage, Loan and Trust Co. is Trowbridge & Niver and their associates and Clinton, Hurtt & Co. Clinton and Hurtt, I believe, are the officers of the company. The stock of the Western Mortgage & Loan Co. is held by both Clinton, Hurtt & Co. and Trowbridge & Niver Co. I think during the time of the Construction Company, Trowbridge & Niver Co. held it all. They were to hold it all until the dam was completed. [329] What the division was to be after that time I do not remember. Trowbridge & Niver Co. took over the bonds of the Big Lost River Co. at 80¢ on the dollar, and if we sold two million we could get a discount of five per cent, and if we sold the bonds as fast as delivered to us, we were still entitled to that discount. The bonds would net the Big Lost River Irrigation Co. 75¢ and interest on the dollar. The last sale of Big Lost River Irrigation Co. bonds by Trowbridge & Niver Co. was on June 23, 1910, but the last bonds received by Trowbridge & Niver Co. from the Big Lost River Co. was on January 15, 1910, at which time Trowbridge and Niver Co. received \$1,000.00 worth. The total sales in May, 1910, were \$3,100.00. The total sales in June, 1910, were \$5,600.00, all of which deliveries were made from bonds held by banks as collateral to Trowbridge & Niver loans, that had been hypothecated on and before February 10, 1910, and were sold in May and

(Testimony of G. H. Speer.)

June, 1910 for the banks which held them and not for the Big Lost River Irrigation Co.

[Testimony of W. H. Rosecrans, for Defendants.]

Direct Examination of W. H. ROSECRANS, Witness for Defendants.

(By Mr. MILLER.)

My name is W. H. Rosecrans. I am a civil engineer. I have been a civil engineer for some twenty-odd years. I took my engineering course principally at Ann Arbor. My office is in the Stock Exchange Building, 30 North La Salle Street, Chicago, Illinois. I was at one time connected with the Arnold Company for about seven years. I severed my connection with them September 1st, 1910. My practice has been general engineering, but my special work has been along hydraulic lines. My practice has been quite extensive. [330] While with the Arnold Company I was connected with the Big Lost River Irrigation project at Idaho. My connection with it began about February, 1909. I sent word for Mr. Speer to come out and look the matter over. I was then connected with the Arnold Company. I assisted Mr. Speer in getting control of the project for Trowbridge & Niver Co. The Arnold Co. began engineering work about the latter part of March. The first man who went upon the work for the Arnold Company, I think, was H. G. Raschbacher. I put him in charge of the work on the ground. He went out there and started surveying and making profiles and examined the water supply and kindred matters.

(Testimony of W. H. Rosecrans.)

Mr. Goyne Drummond and F. A. Coy went out there to assist him. I really do not remember whether Coy went out with Mr. Raschbacher and started work before Drummond came on the ground. At this time Arnold Company were working on this project for Trowbridge & Niver Co. I first met Mr. Corey, of the Corey Brothers Construction Co. in Denver. It was not in connection with this matter. I think it was about the last of March or the first of April, 1909. I met Mr. Corey in Denver in connection with construction work that we had advertised relative to the Croke Canal and the Burlington ditch and its connection to Barr Lake. I talked over that work and advised him that the work would probably go very low as there were a number of people anxious to get it who had their outfits on the ground. Mr. Corey told me that he had an outfit in Canada at the time and told me that he had built considerable canal work for the Twin Falls Irrigation Co., and was familiar with that kind of work in Idaho, and I suggested to him that he would be more interested in taking a contract on the Lost River, which work we had in contemplation, but had not made public. I then told him something about the work and that Mr. Speer was [331] coming west, and if he would talk the matter over with us, perhaps he could get the work, if he would make the right kind of a figure. I do not know whether he told me at Denver that he had come there to bid on the work. He told me he came there to look it over. My intention was to give me the best advice I could, and that he would

(Testimony of W. H. Rosecrans.)

have a better chance to bid on the work out west. I do not think Mr. Corey bid on the Denver work. I am not positive.

From Denver we went to Boise; that is I introduced Mr. Corey to Mr. Speer at Denver, and he joined us on our trip west. Mr. Speer and Mr. Corey had a conversation at Denver. I do not know how extended. I said to Mr. Corey: "You talk with Mr. Speer and talk the situation over and I also will talk with him." I spoke with Mr. Speer, told him Mr. Corey had a large outfit and was familiar with irrigation and canal construction, and it struck me that he would be a good man to ask to bid on the Lost River work. I think we left Denver in the evening and went to Cheyenne. We got a Union Pacific train from Cheyenne west. I am not clear on that matter. I am under the impression that Mr. Corey left us on this trip either at Green River or Pocatello and then came on and met us at Boise. I saw him again before I left Boise. He came back and met us in Boise. On our trip from Denver to Green River or Pocatello Mr. Speer had quite a long talk with Mr. Corey and I had quite a long talk with him. He asked me about the finances of this affair and I explained the situation to him; that the Trowbridge & Niver people supplied the money for these projects from the sale of bonds; that the bonds were sold as rapidly as they could get them in, and from the proceeds of those bonds the contractors were paid from time to time. [332] I explained to him that they were having large work at Denver and that the

(Testimony of W. H. Rosecrans.)

contractors were substantial fellows, as he could see. They were all working along satisfied on that plan. That was the same scheme they were going to use in the west. It was suggested to him in my presence that Trowbridge & Niver Co. had taken over this project and were going to sell bonds. I did not state to him on the train who was to sell the bonds, but had further talk about the matter in Boise before Corey submitted his bid on the work. I explained to Mr. Corey that this matter would be handled just as it was subsequently handled; that Trowbridge & Niver would supply the money from time to time to carry on the work. I did not go into the matter with Mr. Corey whether or not this company which was to take over this project had yet been incorporated. I explained to him the system Trowbridge & Niver Co. worked under was to sell the bonds on this project, and from the sale the money would be supplied to the contractor. He wanted to know where the money had come from and I explained it to him. I explained to him that Trowbridge & Niver Co. were the people that we looked to for our money. We had a contract with them for the engineering and we were thoroughly satisfied with them, and thought they were all right. I do not remember of going into detail as to how soon these bonds could be issued or whether it was necessary to wait until after there was an opening. Whether there was such a conversation held about that between him and Mr. Speer I cannot recall. I know that he and Mr. Speer talked over these questions and I was present. Mr. Speer

(Testimony of W. H. Rosecrans.)

had a considerable talk about the matter. I told him to talk it over. Mr. Speer and I told Mr. Corey who would supply the money before the bonds were issued, not at the early part but later on, when it came to making a contract, [333] I explained this much further to him then. I told him that while I had recommended accepting his bid, and had Mr. Speer's approval, that he must not get his outfit down there until we notified him, and that then he would have to work along slowly with Trowbridge & Niver Co., as they would have to advance money to him until they got in shape to sell the bonds, that is, he must not go too fast from month to month. Estimates were made by the month and we would have to get together about the maximum amount of work he should do in one month while Trowbridge & Niver Co. were advancing the money. I believe Mr. Corey did some work before the contract was finally signed up and accepted, although it was agreed to with Mr. Speer. The contract was all drawn up, but I think there were some final signatures, or at least the signing by the company was not done when the first estimate came in.

I was the chief engineer of that project while Mr. Corey's work was going on there. Mr. Raschbacher was official engineer until about the first of October, 1909, after that Mr. Drummond. Mr. Drummond did not have any authority to change or deviate from the plans or specifications without written permission from me. He had no general written or verbal permission to make any changes at that time. The letter you show me is not signed by me. That is

(Testimony of W. H. Rosecrans.)

addressed to me. I received that letter. Mr. Drummond was placed as engineer in charge on the ground about the first of November. I have no recollection of Mr. Drummond asking permission after that date to make certain changes from the plans. I do not remember anything about that letter dated Mackay, Idaho, July 23, 1909. It is addressed to the Arnold Co. for my attention. I received several hundred letters a month from many different pieces of work. I cannot recall what the letters were or what my objections were unless [334] it is something of considerable moment. I do not remember at what time Mr. Coy went to work as engineer on the dam. He was there for a while and had charge of the work on the dam. He was superseded by Mr. Greeley. That came about through the request of Mr. Corey, and on the recommendation of the resident engineer. I do not know whether it came up by the request of Mr. Corey. I think Mr. Corey mentioned the matter first and I investigated. I recall receiving that letter from Mr. Corey, and acted upon the matter in due time. I do not think I saw Mr. Raschbacher between the receipt of this letter and the writing of the letter of November 26th, but this matter had been in abeyance for some time previous to Mr. Corey writing the letter. Mr. Corey had spoken to me verbally about the matter some time previous to that. Later I asked that he write a letter to me, so that I could take it up and in the meantime I discussed the matter with Mr. Raschbacher.

(Testimony of W. H. Rosecrans.)

Cross-examination by Mr. HENDERSON.

I think all of the estimates that I signed and delivered to Corey Brothers Construction Co. were correct. That is my recollection. I think after Mr. Raschbacher left, I instructed Mr. Goyne Drummond to take charge. I also instructed Mr. Raschbacher to put him in charge, or advised them mutually so that both understood it. As I recall it Mr. Raschbacher turned the matter over to him. I thought Mr. Drummond took charge the first of November. The letter indicates the 13th. The estimates would be signed by Mr. Raschbacher if he was there and in his absence Mr. Drummond probably would. Mr. Drummond was second in [335] command there until Mr. Raschbacher officially left. Mr. Raschbacher and Mr. Drummond were acting under me, and they as engineers, were representing the Big Lost River Irrigation Co. through the Arnold & Co. We changed the plans of the Big Lost River Irrigation Co., that is the plans that were there when we took over the work. They were the plans of the old company. I remember the plans and specifications in general that were furnished the Corey Brothers Construction Co. I know that they were different ones from the ones that were made for the old company. There may have been some changes in the plans given the Corey Brothers Co. That would be a matter that you would get best by referring to the record. I do not recall whether we changed the spillway. I cannot recall whether the changing the face of the dam from riprap to concrete was after it

(Testimony of W. H. Rosecrans.)

had been accepted by the State or not. I remember Mr. Corey asked me about the price on changing from riprap to concrete. Mr. Corey did not say that he was not in the habit of doing concrete work for that price. He said something about calcimining. I cannot recall the point. I cannot state at what time that was done, whether the plans had been accepted by the State of Idaho or not. The point of the transaction as far as Mr. Corey is concerned is, his plan contemplated riprapping, but when we finally prepared the plans for the dam, we put in a thin concrete face on there. That was the point that affected him. He put in a price for concrete work. We had the power to make changes in the plans and specifications, with the acceptance of the State of Idaho and agreeably to the contractor. With those limitations and agreeably to our clients, I made them. Mr. Coy is a civil engineer. He worked out there for five or six months, on the Lost River work, and the latter part of the time [336] had charge of the staking out and inception work on the Mackay dam. Mr. Greely succeeded Mr. Coy. I made the trip from Denver to Boise that I refer to the latter part of March or the first of April. The contract was let for building the works on the Big Lost River Irrigation Co. to Mr. Corey, I think in May. At that time the specifications had all been drawn up. I do not think they had been signed by the final company. Just when it was actually let to him I do not know. We accepted his bid verbally. The other contractors who bid on this work were Maney Brothers and Mc-

(Testimony of W. H. Rosecrans.)

Arthur Brothers. I think also now that you ask me that Donald Grant also bid on it. I explained to all these other contractors at different times how money was going to be raised to pay for the construction work. I do not believe I told Mr. Corey on the trip from Denver that Trowbridge & Niver Co. were a very wealthy concern. I told him we considered them reliable and substantial; that they were able to advance the money in my best judgment, and that we were taking a chance on them, and thought they were all right, and these other contractors were, and I gave them as good a recommendation as I could. I was relying on Trowbridge & Niver Co. We thought they were all right as far as we were concerned, we depended upon Trowbridge & Niver Co. for our pay and I explained to them the situation.

Redirect Examination.

(By Mr. MILLER.)

I did not tell Mr. Corey that Trowbridge & Niver Co. would pay him whether they sold any bonds or not. I did not say anything to Mr. Corey to the effect that irrespective of any bond issue, Trowbridge & Niver Co. would pay him on this whole thing. Mr. Corey thought this thin concrete would be more expensive than mass concrete work. The only changes in the plans and [337] specifications that were made were some minor changes. Such changes as I know anything about were submitted to me and authorized by me in writing. I do not know anything about the change in the Antelope Creek

(Testimony of W. H. Rosecrans.)

crossing. I do not recall anything about changes in the place of putting the flood-gate or the mud-gate at the Blaine head works, or doing away with a wall 100' long and 7' high or reducing the weir there from 150' to 125'. I did not authorize making the fill of the dam by dumping from a diagonal trestle on the core-wall. I did not authorize putting the gravel in stratas so that there would be a coarse heavy strata below.

I remember that the estimates that were prepared by Mr. Drummond were first sent to Chicago to the Arnold Co. to be looked over and signed here and then one copy was delivered to Corey Brothers Construction Co. Mr. Drummond, did not to my knowledge, sign estimates and deliver them to Mr. Corey or the Corey Brothers Construction Co. without those estimates having been submitted to Chicago and approved in my office.

Recross-examination.

(By Mr. HENDERSON.)

The last time I was out there and made an inspection of the Big Lost River project was in the fall, September, 1909. I looked at the work that had been done on the dam. I looked over the work that had been done at the time at the head-gates of the Blaine Canal. There was no Antelope crossing in at that time, nor were there any gates in at the head of the Blaine Canal. I think the work I looked over was constructed according to the plans and specifications. I have no fault to find. I think Mr. Corey was doing all right when I was there. [338]

(Testimony of W. H. Rosecrans.)

Redirect Examination.

(By Mr. MILLER.)

The Antelope crossing and the head-gate of the Blaine Canal were not finished when I was there. Mr. Coy was on the dam then. Mr. Drummond was down on the Powell tract and Mr. Raschbacher was the engineer on the ground.

Recross-examination.

(By Mr. HENDERSON.)

The work on the head-gates of the Blaine Canal was not finished. I think they were part iron and part wood. I don't know whether the Corey Brothers Construction Co. were to furnish the head-gates or not.

Redirect Examination.

(By Mr. MILLER.)

September 1st, 1909, about half the concrete work was done at the head of the Blaine Canal. The part that was nearest done was at the head works entering the canal and part of the weir run out a ways.

It was in no condition for final inspection. The quality of the work was good and as far as it went it filled the idea that we had in the plans. I did not inspect it at that time to see whether it was going to follow the plans when finished.

[Testimony of Ralph G. Arnold, for Defendants.]

Direct Examination of RALPH G. ARNOLD

Witness for Defendants.

(By Mr. MILLER.)

My name is Ralph G. Arnold. I am Secretary and Treasurer of the Arnold Co. I have held that posi-

(Testimony of Ralph G. Arnold.)

tion for about ten years. During the years 1909 and 1910 while the Arnold Co. was doing the engineering on the Big Lost River project, the estimates were undoubtedly prepared by various engineers in charge and sent in to Mr. Drummond who would check them and [339] transmit them to the Chicago office, when they would go to the chief engineer, who at that time was Mr. Rosecrans, who would inspect them and pass upon them as to their regularity and correctness and send them to the auditor for a check as to the mathematical correctness and then a copy would be sent to Trowbridge & Niver Co. and a copy to Corey Brothers Co. Estimates that came from Mr. Drummond to our office were typewritten. I do not think that Mr. Drummond was authorized to make up these estimates and hand them to the Corey Brothers Construction Co. before submitting them to the Chicago office. I do not believe that he ever delivered any estimates to the Corey Brothers Co. without submitting them to our office. Corrections were made in the estimates that were sent in to our office by Mr. Drummond before sending them back to be delivered to Mr. Corey.

From this letter that you show me dated December 2, 1909, from Mr. Goyne Drummond, it is evident that there were corrections made in these particular certificates that were enclosed in that letter. They were corrected and sent back to Mr. Drummond, who in turn delivered them to the contractor. If there were no corrections to be made, they were sent back to Mr. Drummond, who gave a copy to the

(Testimony of Ralph G. Arnold.)

contractor, the certificates being signed by the auditor and chief engineer here in Chicago. It is evident from the letter you show me from our office to Mr. Drummond dated February 8, 1910, that in that instance the certificate was corrected and sent back to Mr. Drummond and he delivered a copy to Corey Brothers Construction Co., after the same had been signed by our chief engineer and auditor. So far as I know Mr. Drummond never signed any certificate out there and then gave it to the Corey Brothers Construction Co. without having submitted it to our office for correction and approval. I do not think [340] that he was authorized to do it in any other manner.

Cross-examination.

(By Mr. HENDERSON.)

The change in the certificate of December 2, 1910, sent in by Mr. Drummond was a correction from 129,386.10, as reported by him, to 128,545.03. It was apparently a mistake in the amount allowed in the certificate on account of force account work performed that month. We took the figures made by our engineer in charge relating to the measurements of earth and rock work done on the canal. I do not think there were separate certificates issued for force account, but that was incorporated in the certificate covering the unit price work. The mistake of December 2, was for \$841.07. That was corrected. Another error appearing was the footing of an invoice for \$3016.22, which was reduced to \$2,917.22. A letter of the Arnold Co. to Mr. Goyne

(Testimony of Ralph G. Arnold.)

Drummond dated Dec. 7, 1909, Resident Engineer of the Arnold Co., Mackay, Idaho, signed by W. G. Farnsworth states that certain certificates were incorrectly numbered and that certain totals were reduced from \$129,386.10 to \$128,525.03 and that a force account for the month of November amounted to \$8,462.46, whereas the bills attached to the certificates only showed \$7,527.94. Also calls attention to an error in footing on invoice for \$3,016.22 covering work by Force account at Camp No. 3 and to items of excavating trenches of Bridge No. 1. Bill reduced to \$2,917.22. States they are returning two copies of certificate covering the above amounts. Requests that Mr. Drummond deliver one copy to the Corey Brothers Construction Co.

I did not personally send out any of these estimates. The letter I have just read is a copy of a letter which I [341] find in our files. The correction in the estimate of February 8, 1910, was 30¢. That letter was addressed to the Arnold Co. attention of Mr. Goyne Drummond, Resident Engineer, Mackay, Idaho. The changes as I have indicated are made right along; that is usual. I would say that the error in the first letter was probably an oversight in not attaching the supporting bill to the sum total called for in the estimate. I have not looked over our correspondence to ascertain whether there were other changes made in the estimates. If a final certificate was delivered to the Corey Brothers Construction Co. by us, we must have thought it correct if we certified to it. I think Mr. Corey did

(Testimony of Ralph G. Arnold.)

his work pretty well, so far as I know. I am not an engineer and I do not want to be asked engineering questions. I never inspected the work or even saw it.

[Testimony of Frank A. Coy, for Defendants.]

Direct Examination of FRANK A. COY, Witness
for Defendants.

(By Mr. MILLER.)

My name is Frank A. Coy. I am thirty years of age. I have been a civil engineer for 8 years. I am a graduate of Armour Institute of Technology. The first year out of school I was estimator in the contracting department of the American Bridge Co. From then until 1907 I was with the Illinois Central and Chicago & Northwestern R. R. Companies. Location and Construction Work. In 1907 I went to work for the Arnold Co., Chicago. Between Jan. 1908, and Feb. 1909, was an engineer on the valuation of the Chicago Electric Light System. In Feb. 1909, I went out to Mackay. Mr. Raschbacher went with me. He was my superior. I went out there to make surveys for the Big Lost River Irrigation Co. We arrived at Mackay the second or third of March. Mr. Raschbacher and I made preliminary surveys for canals and ditches and for the dam site and reservoir and everything on the Big Lost River Irrigation project. [342] The surveys were for the canals and laterals. The dam had been located by the previous company. There were signs of construction work. There had been a channel cut parallel to the bed of the river about six or eight feet deep, thirty

(Testimony of Frank A. Coy.)

or forty feet wide on the east side of the river. There had been an excavation made for the core-wall, and there was a heading for an outlet tunnel. It was lined with timber for a short distance. The excavated rock had been dumped promiscuously right down beside the cliff within the line of the dam. The dam site had already been selected by the parties who worked on the previous project. There was no change at all in the location. The core-wall was placed where the core-wall had been located previously. We were working for the Arnold Company. Mr. Drummond was with us also at that time. He came there two or three days after Mr. Raschbacher and I. He worked with us. Mr. Raschbacher was the superior. Mr. Drummond and I were the assistants. The construction work began about the first of June. I do not know the exact date. Until that time we were doing survey work there. After that I did a little survey work, but not much. My job was to see that the dam was put up according to specifications, and from that time on I was located on the dam until I was superseded the last week in November, 1909. Mr. Fred Greeley succeeded me as engineer. He is dead. Mr. Raschbacher was engineer in charge of the work until sometime in November just previous to my change. He was succeeded by Mr. Drummond. The occasion for my being superseded was a letter I received from Mr. Rosecrans stating that I had been superseded on account of my lack of tact in dealing with Mr. Corey. I do not know where the letter is, whether I left it in

(Testimony of Frank A. Coy.)

Mackay or whether I took it away with me. I may have it at home. I will look for it. [343] If I find it, I will mail it to you at this office or bring it in here Monday morning. I did not have any talk with his son. It was with his foreman, Mr. Martin. He told me that Mr. Corey had succeeded in convincing Mr. Rosecrans that he should remove me for certain altercations we had. That was the first news I had of it. Mr. Martin said: "I guess the old man has a bigger drag with Mr. Rosecrans than you have." Just previous to the time that I was removed I had an altercation with Mr. Martin and Mr. Corey combined. It was over cleaning the concrete that had already been placed. Cleaning it previous to depositing new concrete on top of it. It was covered to about one-half to one inch with thin silt that had washed in from the puddling. They were proceeding to concrete on top of the silt and I stopped the mixing. Mr. Martin sent for Mr. Corey and we had a little altercation then. Mr. Corey stated it was cement grout.

MR. HENDERSON.—I object to this line of testimony on behalf of the defendant trustees, there being no privity of contract between them and the Corey Brothers Construction Co.

It was not cement and I insisted upon its removal. I think that was the only altercation in which either one of us lost our temper. There were no insults or anything of that kind, but rather a hot conversation. We had several other altercations. One in particular was about the location of the road through the

(Testimony of Frank A. Coy.)

borrow-pit. There was a borrow-pit dug on the up stream side of the dam which necessitated building a new county road to clear it. There was a county road through the borrow-pit that had been built up the hill to clear the borrow-pit as originally staked out and paid for by force account. The changing of that road was paid for by [344] force account. Mr. Corey asked for additional borrow material so that instead of moving the earth the second time, by verbal agreement with his son, he was to do that building of the road without charging for it.

I had a verbal agreement with his son, Warren Corey. I had selected the site for the road as it was first built. At that time it was not designed to have another borrow-pit there. That road was supposed to clear the construction work. After that he put in a bill for it. I refused to O. K. it. There was no particular controversy about it. He just took it over their head. I think this occurred after the time that Mr. Drummond was made resident engineer. I understand Mr. Drummond paid for it. As a matter of fact I know that he paid for it, but I cannot state how I know. I think I gained that information from Mr. Drummond. I had some talk with the Corey Brothers Co. about the material to be used for making concrete. I insisted on a very good class of material. I insisted they get the material from some gravel banks down in the river bed. There were two sites, equally good, as far as material was concerned. He chose the lower one. There was one above the dam and one below, either place he could

(Testimony of Frank A. Coy.)

have gotten it. His foreman wanted to get the material from the same stuff that the dam was being made from, right alongside from the dirt that came in the cars. He wanted to take some of the material taken from the borrow-pits. His foreman objected to screening. While I was there I succeeded in getting the material, which was used to make the concrete, taken from the gravel-pit in the river bed. I was on the ground about a month after I was superseded. During that time the material for the cement came from the river, from the bank above the dam site. The only concreting [345] that was being done at that time was tunnel lining. I know that after I was superseded they used gravel or material taken from the bank that was dumped from the borrow-pit excavation for making this concrete. I was told it by my assistant, Mr. McCallum. He was my rod man and continued in the same capacity with Mr. Greeley. I presume he is in Mackay now. I do not know. He was a local man there, not an engineer. I had some controversy with the Corey Brothers Const. Co. regarding cutting the borrow-pits too near the dam. As I remember the specifications, they signified that there should not be cutting within 200' of the toe slope. I think they cut nearer than that while I was in charge, about 50' or 60' nearer in places. I objected to their doing this, not so much to them as to my superiors. I do not remember saying anything to the Corey Brothers Construction Co. about that.

The kind of puddling we did there, while I was on

(Testimony of Frank A. Coy.)

the job, we put in a pump there and carried lines of hose up to the elevations upon which we were working and washed the material toward the center. They had a steam pump there. Afterwards they got a larger one. Before they got the larger pump the stream of water was not enough to sufficiently puddle the cement. I do not remember whether Mr. Raschbacher or I told them to get a larger pump. I know they got a larger pump. I do not know who paid for it. I do not remember whether they used it while I was in charge. I know it was used while Mr. Greeley was there while I was on the job. After I was superseded the puddling should have been much better, because the pump was capable of supplying a much larger stream of water than the other one. I saw them putting in the pump and pipes. That was about one of the last things that was done while I was there—putting in the pump. The pump was installed and the pipes were installed while I was there. [346] In order to do the puddling sufficiently I recommended that water be supplied from Cedar Creek in a flume. They would have had to bring it about $3\frac{1}{2}$ to 4 miles in a wooden flume. There was plenty of water in Cedar Creek. I gauged it in July. I think it would never get much below that. I do not think the pump was in working order when I left. I do not know whether it afterwards was in working order or not. There was some sheet piling driven while I was in charge. They began on the bar between the river and the rock cliff and drove to the rock cliff until they could go no further and

(Testimony of Frank A. Coy.)

then started beginning a new one east toward the river. I should judge about 200 or 300' lineal feet of the piling was driven before I was superseded. After I was superseded and while I was still on the ground, I saw piling driven in soft material. I saw piling that was not driven to refusal. I only remember one particular pile that I happen to watch. They spliced the two together 32 feet long and still it did not go to refusal, when it was down. I know that other piling was driven in the same way; that was bound to be so. One pile locks into another. I do not know anything about the adjacent ones. I was just a spectator as it were. Several times I had to insist strictly on their plowing the ground. Sometimes they would plow enough to last for a day and the men coming on the dam would cover it up. They kept right on going unless we insisted strenuously on getting it started again. There was some plowing done twice—it was allowed to weather too long and I insisted upon it being done over again. It was not all plowed twice. Mr. Drummond made two or three trips up to the dam just as a [347] spectator just before Mr. Raschbacher left. After Mr. Raschbacher left, it was not very long until I left. Mr. Drummond came up a few times from the time he came there until the time I left. A fair part of the material taken from the tunnel was put in the dam. Some of it was wasted. When I say wasted I mean thrown away. There was no rock from the spillway placed inside of the dam foundation. The natural angle of repose of the material excavated from the

(Testimony of Frank A. Coy.)

borrow-pit was $11\frac{1}{4}$ to 1. It was very uniform material. I had some controversy with the Corey Brothers Construction Co. about their attaching pipes onto our tank for their own use. That being force work, I thought they should bear a pro rata share of the cost. I think they used about one-third of the water for their own purpose. I insisted that they should pay for it. That was in abeyance when I left. I do not know how it was settled. There was a pump being operated on force account, and they were using a portion of the water for supplying their engines and steam shovels, and they objected to paying for the part of the water that they used.

After I was superseded and left the dam site, I was transferred to the Colorado Southern Irrigation Co. at Canon City, Colorado. I was working under Mr. Raschbacher for the Arnold Co. I was not discharged by the Arnold Co. My salary was raised. I was doing the same general line of work there, only I was connected with the building of a canal. I was on preliminary work, surveying. The bottom of the trench that was dug from the end of the core-wall up the left bank was gravel, the same as the gravel-pits. It was the same material as deep as the trench was dug. There was a very light layer of soil on top in places. The core-wall was also placed on that same kind of material. The bottom of the trench in which the core-wall [348] was placed was the same kind of material as in the borrow-pits.

(Testimony of Frank A. Coy.)

Cross-examination.

(By Mr. HENDERSON.)

I quit the Big Lost River work the latter part of November, 1909, and I stayed around there for about a month. I was instructing Mr. Greeley, getting him familiar with the work. I was also waiting instructions to go to Canon City, and while I was doing that I stayed and helped him out. After those controversies with the Corey Brothers Construction Co. about how the work should be done, they did it as I directed.

While I was there as engineer in charge I saw to cations were carried out and the work performed it to the best of my ability that the plans and specifications according to them. There were occasional slight variations. I would call attention to them to my superiors. I called the attention of the Corey Brothers' employees to how I wanted the work done. They followed my instructions. There was one or two of those controversies. One in particular was due to the fact that they did not follow my instructions for a while. For an hour or so they did not. Finally they came around and did the work as I wanted them to do it.

The core-wall, while I was there, had progressed as follows: It started from a depth of 6' flush with the ground at Station No. 11, and went level for a distance—I do not know the exact number of feet, approximately to the river bank. In height it would vary from 6' to 20'. In the end they built the core-wall under my instructions. There were contro-

(Testimony of Frank A. Coy.)

versies on the subject. In the main my directions were carried out. [349] I do not remember the exact date when the Corey Brothers Construction Co. started the work. I know they got an estimate for June. That was for work they did in the month of June. When I went there with Mr. Raschbacher a little work had been done. A trench had been dug about 500' on a parallel with the creek. It was dug in the hill-side, so on one side it was 6' deep and the other about 15'. It was evidently dug for outlet work. The outlet works were not finally put there. It might have been intended for a temporary river channel, but it doesn't seem reasonable to me.

I have had the bossing of men before on contracts. I had more controversies with him than I had with other men. I never had more with others. The pile-driving was all done by force account. The piles that we are referring to, that work was not done under my supervision. That was under Mr. Greeley's, when I was just a spectator there. The wetting down of the dam was all on force account. The difference it made to Mr. Corey was on account of the inadequacy of the pump his work was delayed. He had to wait for the pump to get his work out. It took longer than necessary. It was a drawback to Mr. Corey. Whatever the actual cost plus 10% was paid by the company.

Redirect Examination.

(By Mr. MILLER.)

I cannot give my opinion whether the puddling before they got the new pump in was insufficient to

(Testimony of Frank A. Coy.)

make an impervious wall in the center. I would have been much better satisfied with more water. There was no fill from a diagonal trestle crossing the core-wall while I was there. The puddling with the water supply with an insufficient capacity was to a slight extent an interference and delay of Corey's work. All the [350] piling I drove did not interfere with Mr. Corey's work at all.

Mr. Coy advised the notary by telephone on Monday, June 3, that he was unable to find the letter notifying him that he was superseded by Mr. Drummond.

[Testimony of George H. Binckley, for Defendants.]

Direct Examination of GEORGE H. BINCKLEY,
Witness for Defendants.

(By Mr. MILLER.)

My name is George H. Binckley. I am an engineer. Have been one for 25 years. For a time, between four and five years I was connected with the Arnold Co. I left them in April of this year. I went to the site of the Mackay dam the first of August, 1910. I went there to close Arnold & Co.'s office and take charge of their effects. I left there August 5. Mr. W. W. Corey, President of the Corey Brothers Construction Co., was there at times while I was there. I had several talks with him. I inquired from Mr. W. W. Corey as to why the water was flowing through the dam. He explained to me that some of the excavation from the rock side had been deposited in the dam and that the concrete floor had been filled over that, this floor being the floor

(Testimony of George H. Binckley.)

of the portal of the outlet tunnel and that the water could pass freely under that floor. He also explained that the toe wall at the bottom of the concrete facing had not been put in place in the old channel of the river, and that he was satisfied a good deal of water was going through in the old channel. The excavated rock over which the concrete floor had been placed was above the core-wall. At different times when I was there after August, 1910, we estimate that about five second-feet of water was passing through the opening in the core-wall. The opening, I think, was closed by means of a flash-board. In September [351] when the old one was closed the water rose to a height of about 7 or 8' above the core-wall. The water in the reservoir was about two or three feet above the core-wall. The relative elevation between the water in the reservoir above the water above the core-wall remained about the same as before that opening was closed, between 2 and 3' above; that is at all times the water in the reservoir was between two and three feet higher than the water immediately above the core-wall. That water was coming through a fill about 300' in width above the core-wall. The explanation given by Mr. Corey as to where the water was going through seemed very reasonable to me. I cannot say that I observed any boulders near the core-wall. In one of the test-pits which I dug for Mr. Robinson, the State Engineer, we found the material was not well mixed. There would be a stratum of fine material and then a stratum of considerably coarser material. The character of the strata of

(Testimony of George H. Binckley.)

coarse material were such that I think water could flow through them freely. The test-pit was dug right alongside of the core-wall on the lower side. I observed trestles crossing the core-wall from which dumping had been done. A trestle was built there and dumping had evidently been done from it. As I remember, it crossed the core-wall at an angle of 60 degrees. I think it was on the second lift. I am not entirely sure that those lifts were there. Under conditions as I found them there it would be hazardous to impound the full proposed amount of water without making a cut-off on the upper side of the dam. The probable result of going along and filling up the reservoir without any cut-off in the upper wall would be that the water would have [352] poured right down in the lower portion of the dam, or taken a portion of it out. If you take a portion of the dam out, it all goes in time. I suggested to Mr. Corey at the time that he might float the finer material in under the concrete floor and we talked about a sheet pile cut-off along the upper toe. Another method to do that would be to excavate and fill along the upper toe with material that would be impervious.

Mr. HENDERSON.—Let this testimony, all of it, go in under my objection already made.

Mr. MILLER.—Yes, sir.

With the situation as I found it there, in order to make a safe dam to impound a head of 120' of water or thereabouts, it would have been necessary to arrange some cut-off at the upper toe of the dam, a cut-off consisting either of an excavated ditch filled

(Testimony of George H. Binckley.)

with a different class of impervious material and sheet piling. The safer way to do it would be to puddle this trench. In my opinion the trench should be clear across the bed of the river and 30 or 40' deep, and you probably could not work in there less than 40 to 50' wide. You would have to go to the sides of the river possibly not to the entire length of the dam, but to such a point that the head would not force through the dam itself. The trench should be filled with the puddling material, such as clay and very fine material and then you would have to cover the upper face of the dam with either concrete or riprap in order to make it impervious. If you did not do that the dam would saturate and go out if you had a head of water 120'. You should have a blanket of fine material underneath with riprap varying from top to bottom, but there should be 30' at the bottom, anyway. The present fill there would be used for weight. The present [353] fill and what goes on top of that in the bottom of the dam you would use to get the necessary weight for a resisting point. In my opinion as an engineer, this dam could not have been built starting from the beginning with the clean ground according to these plans and specifications, and make an impervious and safe dam to hold that head of water.

Cross-examination.

(By Mr. HENDERSON.)

I went there in August to close the Arnold Co. office. I left there the latter part of October, 1910. I did not do any work there. Arnold & Co. did not

(Testimony of George H. Binckley.)

have any people working there. There were a few men there up until sometime in August, the 8th or 9th. I think I met you there the 6th or 7th of August. They had an engineer there from New York. I think it was Mr. Holton who was there about the middle of August. Prior to that time there wasn't anybody doing any work there. All the work had stopped. When I went out there I paid off all the Arnold Co. men with the exception of Dwight Arnold. He was down on the Powell tract. He had charge of one of the camps there and the canal work. He left during my absence in Boise. He left about the middle of August. All the work ceased there about the middle of August, both by the engineers, contractors, and sub-contractors. I was with Mr. Robinson when a test-pit was dug by the sides of the core-wall. That was dug down to about the level of the water as it stood below the core-wall. The test-pit was in the body of the dam immediately below the core-wall and to the east side of the opening in the core-wall. The opening in the core-wall had been closed at times. It had been closed temporarily by a flash-board. The hole was dug 10 or 12' probably from the edge of the water. [354] It went down just about to the water level, perhaps a little below. We found some rather coarse material there. It was a little west of the center of the dam on its axis. I was never there after the State had put in the spillway. I was there in March and left about the 1st of April, 1911. The spillway was not in there then and Mr. Corey was figuring with the State

(Testimony of George H. Binckley.)

officials to build it at the time I was there. We drilled several test holes. There was some water in the reservoir when I was there. It went to a depth of about 28'. There seemed to be very little difference between the amount of water that was coming through at that time, and when the water was lower. We estimated that there were about 5 second-feet of water coming through, and that was when the water was 28' in the reservoir up on the dam. Practically the same amount of water was coming through the dam when the water in the reservoir went down. It is not my opinion that part of that water came from Cedar Creek. I think the water from Cedar Creek came out below the dam. At times it came through the hole in the core-wall, but other times we had the hole closed. We closed it with flash-boards. We did not have it entirely tight, but it was enough so that the water would raise on the upper side of the core-wall quite a good deal.

Redirect Examination.

(By Mr. MILLER.)

The water could not come through a hole in the core-wall unless it came through 300' above it. The test-pit was dug immediately downstream there and adjacent to the core-wall. When the water was 28' high in the reservoir, it was about 2 or 3' higher than the water that was standing immediately above the core-wall. I have had a miscellaneous experience in irrigation projects. I have never specialized, but I have [355] had considerable experience—practically all of my time with the Arnold

(Testimony of George H. Binckley.)

Co.—for a period of four or five years in connection with irrigation projects. All of which had earth or loose rock dams. My connection with them was only surveying. I have been an engineer 25 years and my work was miscellaneous, steam and electrical railroad work, engineering work of pretty nearly every kind, municipal and contracting end of it. After we closed the hole in the core-wall there was still water coming through the core-wall, and there was water coming out of the lower toe of the dam, substantially the same amount coming out below the toe of the dam. When the hole in the core-wall was filled up, I could not tell where the water came through. As I recollect, we had but one pit in the puddled portion of the dam. I think that the upper toe of the dam had not been put in place directly in the old river channel. They had a coffer-dam arrangement there and the water came up so high that they were unable to put that core-wall in at the lowest part. They did not put it in for quite a distance. That is what Mr. Corey told me.

Recross-examination.

(By Mr. HENDERSON.)

I think I saw some photographs taken by Mr. Storrow quite awhile ago. I think those pictures showed pretty much what was there. None of them were exaggerated. There was no intention of exaggeration in the photograph. Some of the coarse material had been dumped down loose over material that bore evidence of being puddled, and in the picture the material would look like it was in worse

(Testimony of George H. Binckley.)

shape than it probably really was. [356]

Redirect Examination.

(By Mr. MILLER.)

I saw those pictures and Mr. Storrow's report some little time ago. I forget the date. Some of them would give the impression that the conditions were worse than they were. There was loose gravel put down over the face of a fill that had probably been puddled. As soon as you would kick off loose material you could see it was hard underneath. I think the loose stuff got there by the people passing over there or by the last dumpings that had gone down there. I do not mean to say that the photographs were not taken there or anything of that kind. I mean to say that the photographs showed certain conditions that existed at that time. I think they were good photographs. What I mean to say is that I suspect in some places there was some puddling underneath some loose rock. The loose rock had not been puddled. Photographs usually show what is on the exterior of the thing taken, and that was also shown in this instance.

[Testimony of Samuel Storrow, for Defendants.]

Direct Examination of SAMUEL STORROW, Witness for Defendants.

(By Mr. MILLER.)

My name is Samuel Storrow. I have testified in this case before. I have seen the letters sent by Mr. Raschbacher ordering the rock excavated from the spillway to be put within the line of the dam. I have

(Testimony of Samuel Storrow.)

studied these specifications. As an engineer I would not say that there was any deviation from the specifications. If the rock were put in there according to specifications, dumping it from the toe and doing the other things called for, including the puddling, it would not be a deviation, nor would it be a detriment. [357]

[Testimony of James A. Green, for Defendants.]

JAMES A. GREEN, a witness for defendants, testified as follows:

I reside in Chicago; have been a civil engineer for fifteen years; graduated from the University of Nebraska in 1902. I have an office in Chicago and in Boise. My line principally has been railroad engineering and irrigation work. Have been engaged in irrigation work continuously since 1904 and intermittently before then. I have had to do with the engineering and construction of those irrigation systems, have superintended the construction of three large dams, have made plans for others. These three large dams of which I have supervised the construction were earthen, impounding from 70 to 148 feet of water.

I examined the Mackay Dam in September, 1910, at the request of the Farwell Trust Company of Chicago, representing certain proposed investors. I spent the greater portion of a week there in investigating the work already done, studying the reservoir site, etc. I observed that the material that had been dumped into the dam had been dumped from trestles

(Testimony of James A. Green.)

running at various angles from the central line and crossing the core-wall. I should judge that approximately 40,000 to 50,000 yards had been dumped from the trestles crossing the core-wall at an angle; that would be an estimate. The material that was lying next to the core-wall which had been dumped from the tracks was generally coarse. The larger pebbles were the size of your two fists. The voids created by the coarse material running down against and adjacent to the core-wall had not been filled. The angle at which the dumped material was lying was the natural angle of repose of that material.

I observed there was a free flow of water through the dam. I estimated close to 10 second-feet. This water had to percolate through 600 feet of fill from the upper to the [358] lower toe. I estimated the elevation of the water in the reservoir is about 2 to 3 feet above the elevation of the water standing immediately above the core-wall.

The effect of dumping the material from those borrow-pits from a twenty-five foot trestle is to create a conical shaped dump, the larger boulders rolling the farthest. The character of material in the borrow-pits was gravelly, grading from fine particles to larger sizes. I looked for a stratum of clay or hardpan but found none. The borrow-pits were excavated about 18 feet deep. It was all of a uniform character. I would estimate twenty per cent of the material would be fine and suitable to puddle. With this material as it came from the pits it was sufficient, if properly separated and transported to the

(Testimony of James A. Green.)

center of the dam, to make a sufficient puddle. This is done usually by throwing a stream of water on it. Puddled in this way flattens the slope of the dam. If you find the dumped material is lying at the natural angle of repose, it shows that it has not been saturated—very little puddling done. My conclusion as to the cause of this water going through the dam was because the coarse material was at the bottom and the voids not filled up. Filling the whole dam by dumping from trestles twenty-five feet high at the toe and then dumping from cross trestles, the character of the fill at the bottom would necessarily be coarse, with the voids not filled; it would be pervious. It would be impossible now to fill those voids without a complete rehandling of the material. I mean removing from the dam all that material dumped in the center along each side of the core-wall.

The rock excavated from the tunnel or spillway in the cliff was placed in the slope of the dam and on the slope of the canyon, the side of the rocky cliff. I saw that placed 15 or 20 feet from the core-wall. It was dumped loosely in a [359] pile. It could be made impervious by removal and redeposit, so that the particles would not touch and then puddling around those rocks; not otherwise. This pile of excavated rock was partly covered by gravel.

If this dam were completed, the work from now on being on the lines of the original plan, it would not be a safe and sufficient dam to impound a head of 120 feet of water. It would not, in my opinion, hold that much and could not be safely filled to that

(Testimony of James A. Green.)

extent. If so filled, it would become weakened by the excess of flow through the present structure as now built so as to endanger the whole structure—fatal. I would not as an engineer advise attempting to finish that dam on the original lines and then attempt to impound 110 feet of water. I have examined the contract and specifications for this dam between the Big Lost River Irrigation Company and Corey Brothers Construction Company, and if the dam had been constructed by the contractor in strict accordance with the contract and specifications, in my opinion, it would have made a safe and sufficient dam to impound 110 feet of water.

Defendant's Exhibit 14 correctly represents a view looking from the cliff across the stream, and Exhibit 18 correctly represents a view of the core-wall and fill as I saw it. The so-called State spillway had not been put in when I was there. Defendant's Exhibits 37, 16, 36 and 44 correctly represent conditions as I saw them, except the State spillway.

The nearest borrow-pit was excavated, I should say, as close as 20 or 25 feet to the upper toe. I would think the borrow-pits were 40 or 50 feet away.

Cross-examination.

The fines could be placed near the core-wall either by mechanical screening or by water transportation. It should [360] have been thoroughly compact by placing enough fine material in it so that the voids would be filled. I agree with the method of dumping from trestles. If water is used in the transportation of the material toward the center of the dam,

(Testimony of James A. Green.)

all that would be necessary would be to have the center of the dam impervious, leaving the outer sections formed from the heavier materials. It would be proper to dump from cars and then transport into place by water. If the trestle was at the outer toe, I would wash the fines from the coarse; that would wet the whole dam. I did not see sufficient pumps there to do that. I did not find any specifications that I read over that the whole dam should be wet. I think the specifications said a pyramidal section 30 feet on the bottom. I think that is sufficient if it was puddled. It wouldn't be necessary to wet the dam all the way through. I said that practice would wet the entire section but it was not necessary and the outer section wouldn't stay wet because it was built of the coarser particles and would rapidly drain out. The only object of the water would be to separate the finer from the coarser and thereby get the puddled material, which would be impervious, in the center section. I would move the material, that is 150 feet from the core-wall to within the zone of 30 feet by water. If I didn't do it in that way, I would put in puddled material, as it came from the borrow-pits. I think the contract and specifications provide for the puddle being impervious. (The contract and specifications handed to witness.) These two paragraphs would lead me to conclude that enough water was to be pumped against the slopes to thoroughly wet it and to make a puddle in the center of the dam, and if this material was not satisfactory, the contractor, under the next paragraph,

(Testimony of James A. Green.)

would be required to select material so that when brought in and wet it would fill the voids and make a puddle. [361]

When roughly estimated the amount dumped from diagonal tracks to be 40,000 to 50,000 cubic yards. (Section 8 read to the witness.) I would interpret the specifications to mean that the material should be dumped parallel with the core-wall. I saw only one railroad track across the core-wall at an angle. I saw the part of the trestles and the dumps from which the rails had been taken on two or three definite lifts. If I were a contractor and the engineer in charge directed me how to dump the material, I would follow them as provided in the contract. I think about 100 to 150 cubic yards was dumped parallel to the core-wall.

This coarse material that I saw near the core-wall came out of the borrow-pit. If the authorized engineer told me to dump certain material in the dam, I would do it. If he was the only engineer on the work, I would have to have information that he was the authorized engineer. If he was and gave me orders in writing, I would probably carry them out. I wouldn't make changes except when authorized in writing if the contract called for it to be given that way.

I dug into the slopes as much as I could without the use of tools. I think I was in the dam two days. If by the core-wall and immediately below the reservoir on the lower side of the wall test-pits were dug five to twenty feet below the surface of the water in

(Testimony of James A. Green.)

the reservoir, I presume they would be wet—that would be a guess.

I made a report in writing to the Farwell Trust Co. I have seen the design for the core-wall on paper. I have seen a paper like Defendants' Exhibit 1. I can't answer from looking at the drawing entitled "profile" on center line of dam how deep the trench was to be dug because the plans were attached to the contract and made a part of the contract and specifications; and there is no definite line for impervious material shown. This indicates what might be the depth, I would [362] judge. Section 5 indicates they were to be dug to impervious material. Section 6 amplifies my other answer on puddling. Section 7 provides for bonding into the impervious material, also the latter part of paragraph one. Reading from paragraph two, the plans together with the contract make it indeterminate as to what depth you would have to go for impervious material.

In my report to the Farwell Trust Company I spoke of the four-inch concrete sheet on the upper face; that work was done. I didn't find it in the contract. I concluded the plans contemplated it, or they would not have done it. I reported that the top of the core-wall was to be 50 feet above the stream bed and the bottom 6 feet below the original ground surface. That was my conclusion from Exhibit 1.

I measured the distance of the borrow-pits from the toe of the dam by stepping and guessing; did not step them all. If anyone says that the borrow-pits are not nearer than 175 feet from the toe of the dam,

(Testimony of James A. Green.)

I would say they are mistaken.

I didn't measure the water coming through the dam. There was a hole through the core-wall. I measured the water by guess just below the lower toe of the dam. Some of that water came through the hole in the core-wall.

Redirect Examination.

When in my report I spoke of the bottom of the core-wall being six feet below the original ground, I referred to the measurement as it appears on this blue-print, assuming that the dotted line means the bottom of the trench and measuring according to the scale. When I say that, taking the contract, specifications and blue-print together the distance is indefinite. I refer to that provision of the specifications relating to putting down a trench to impervious material and to the provisions requiring a good structure. [363]

In my opinion the closing of the hole in the core-wall would not prevent the water from coming through the dam; that might cause the water to rise a little higher on the upper side of the wall. If the core-wall was impervious that ten second feet of water would come out below as it is doing now. If the water was in some way confined above the core-wall that ten second feet would saturate the whole upper half of the dam.

If I were working under a contract providing that no change should be made except by written order of the chief engineer, I wouldn't make a change ordered verbally by some other engineer.

(Testimony of James A. Green.)

If all the material in the dam was dumped toward the core-wall from tracks parallel thereto, a trestle having been built in each toe, and after the embankment was built so that the base of the dump was thirty feet from the core-wall, and then we began throwing a stream of water on that incline as the dumping was done, we could get with the material out of the borrow-pit a sufficiently impervious section thirty feet wide on each side of the core-wall. The borrow-pit had sufficient voids in it to accomplish that. Doing it in that way the boulders of the size I have mentioned would be no detriment to the dam. It would not be essential to wet the material clear to the upper or lower toe of the dam in order to get this impervious section sixty feet wide at the base of the core-wall.

If the dumping is done from a trestle parallel to the core-wall from the end of the fill, the trestle not being strong enough to support the weight of a loaded train, the work being done, therefore, by dumping each car as it reached the end of the fill, dumping in that way would not make all the strata toward the core-wall. It would take four directions, that is three directions at right angle each to the next one.

[364]

Recross-examination.

I would interpret these plans and specifications to mean that the steel piling should go down to impervious material. The dam was to be about 600 feet wide. I don't think it would make any material difference how you dumped the material 300 feet from the core-wall.

[Testimony of W. F. Day, for Defendants.]

W. F. DAY, a witness for defendants, testified as follows:

I am a civil engineer residing at American Falls, Idaho. Am engaged there on the construction of a dam and power plant. Have been a civil engineer seven years. Graduated from the State University of Nebraska in 1906, getting the degree of B. S. C. Since that I have been continuously engaged in engineering work, almost entirely irrigation. I have supervised the construction of two dams, one of them impounding 133 feet and the other 120 feet of water, both earthen dams. I have supervised the construction of three systems of canals, aggregating several hundred miles; have been engaged in construction work on two irrigation systems in addition to those I have mentioned, also in investigating and reporting on several others. Have been connected with James A. Green & Company for a year and a half. Examined the Mackay dam and canals of the Big Lost River Irrigation Company in September, 1910; spent eight days on the dam and canals. There was then water coming through the dam five to ten second feet. The water in the reservoir then was about twelve feet higher than the water below the dam. I made memoranda at that time and have them with me. There was water standing above the core-wall, the hole in which was open. The water in the reservoir was 2.8 feet above that, standing immediately above the core-wall. I took levels. [365] The water was running through the hole in the core-wall; water was

(Testimony of W. F. Day.)

coming out below the dam in the old channel of the river. About half the total amount of water was going through that hole. The dam had not been made entirely from dumping from tracks parallel with the core-wall. There was more than one fill open to my observation made from tracks crossing the core. I remember three, there may have been others. I remember only one track actually crossing the core-wall when I was there. I noticed the character of the material next the core-wall wherever it was exposed. In most places it was coarse. In one place it was quite fine. This was good coarse gravel and the voids were not filled. Its character was such that water would flow through it freely. The slope of the fill as dumped was the natural angle of repose. If there had been sufficient puddling, it would have been very much flatter. If there had been any puddling, it would have been somewhat flatter. This water which flowed through was coming either through the dam or through the material under the dam. I could not tell which. Assuming the fill was made by dumping from trestles 25 feet high and that the puddling was insufficient to wash the fines from the coarse up against the core-wall, the necessary character of the base of the dam would be the coarse materials would all roll to the bottom and remain there while the finer would remain above, making the bottom of the dam pervious.

Where a fill is made by dumping from tracks crossing the core-wall at various angles, the material cannot be so puddled as to bring the fines up against

(Testimony of W. F. Day.)

the core-wall. In the case of this dam the only way that the fill could be now so puddled as to make the core impervious would be to remove the material which has been dumped from the diagonal trestles—remove the material from along the core-wall and then back-fill it. [366]

If this dam should now be completed upon the fill already made, the balance being according to the original plans, it would not in my opinion be a safe and sufficient dam to impound 110 feet of water. I don't think that much water could be impounded. I believe that such a large amount of it would percolate through the fill, that it would be very hazardous to continue attempting to fill it. I would not as an engineer advise attempting so to do.

I have examined the contract and specifications between the Big Lost River Irrigation Company and Corey Brothers Construction Company. In my opinion if that contract and specifications had been strictly observed, the dam would have been safe and sufficient to impound 110 feet of water.

I examined the borrow-pit and found the material of a uniform character; did not discover any stratum of clay or hardpan. The pits were excavated about 20 feet. One of the pits was excavated almost to the dam. The others were, I should say, 50 to 100 feet away.

I saw rocks apparently excavated from the cliff deposited on both sides of the core-wall and at one place less than 20 feet from the core-wall. It was piled apparently just as it had fallen from the cliff,

(Testimony of W. F. Day.)

in piles partially covered up with gravel. I believe to make that part of the dam impervious the rock would have to be removed and replaced and surrounded with fine material. The material in the borrow-pit was such that by dumping it from trestles in the upper and lower toes parallel to the core-wall and always dumping toward the core-wall, then wetting the slope of the fill as you approach near the core-wall, washing the fines from the coarse against the core-wall, an impervious center of the dam could have been obtained. You would have to begin puddling when the toe was perhaps 200 feet from the core-wall. If you had an impervious fill 30 feet thick on each side of the core-wall [367] that would be sufficient to hold the water.

I saw the Antelope Creek crossing. It was not built in accordance with Exhibit 5. In the structure as built in order to have water in the canal you would have to close those openings. When so closed they would have no tendency to care for the flood-waters of the creek. That arrangement not being automatic would constitute a danger to the structure.

I don't think the sluice-gate at the opposite side of the weir from the head-gates of the Blaine Canal is of any value. To have that 100-foot wall seven feet high would be an element of safety for the head-gates.

The gates at the bifurcation of the Blaine Canal are not in accordance with these plans, because there are no openings above the gates. With the openings there is an automatic safety arrangement.

(Testimony of W. F. Day.)

The wrecking of that structure as shown in the photographs would be the natural result of having no openings above those gates.

Cross-examination.

When I was there all work had been stopped on the system. The canal banks were built at the bifurcation of the Blaine Canal. I believe the filling behind the concrete work was completed. That portion of those holes above the gates which extended higher than the banks of the canal, would be of no benefit to protect the structure from flood waters. The plans show that the top of the gate is below the top of the bank about three feet and two feet of the top of the hole higher than the bank.

Redirect Examination.

There is a walk above these openings, above the gates as shown on these plans. [368]

[Testimony of Heber Q. Hale, for Defendants.]

HEBER Q. HALE, called by defendants, testified as follows:

I am Assistant Register of the State Board of Land Commissioners of Idaho. I have the minute record book of the Board in which is kept a record of its proceedings. On page 474 is a record of a resolution of the Board relating to the Mackay Dam across the Big Lost River above Mackay. That is a correct record of the action taken by the Board July 15th, 1910. (This resolution recites that it appears from the report of the State Engineer and from the Carey Act Inspectors that the Construc-

(Testimony of Heber Q. Hale.)

tion Company in the construction of the Mackay Dam is not complying with the specifications of the contract with the State dated April 30, 1907, and that their attention has been repeatedly called to that fact by the State Engineer and objection to the construction made and requests that the company perform the work in accordance with the contract, plans and specifications approved; that the company has failed and refuses to comply with the specifications and contract. It is therefore resolved that work upon the dam be discontinued and disapproved until the same is constructed in accordance with the contract and the approval of the State Engineer and that no more contracts for the sale of water rights under the project be approved until the above is done.)

Motion by complainant's counsel to strike out on the ground that the contract is not the one in controversy.

[Testimony of C. B. Hurtt, for Defendants.]

C. B. HURTT, a witness called by defendants, testified as follows:

The first Executive Committee of the Big Lost River Irrigation Company consisted of myself, J. E. Clinton, Jr. and N. M. Ruick. We were appointed July 16, 1909. From that time on the members of the Executive Committee knew Corey [369] Brothers Construction Company were proceeding with the construction of this irrigation system under this contract offered in evidence. Each and all of

(Testimony of C. B. Hurtt.)

them so knew; knew that the contract had been drawn up and was in its final shape except the final signatures and that he was proceeding with the work.

Cross-examination.

All of them knew about the time when Corey Brothers Construction Company commenced the work under the contract; that was early in June.

**[Testimony of James A. Lynch, for Plaintiff
(in Rebuttal).]**

JAMES A. LYNCH, a witness for complainant in rebuttal, testified as follows:

I live in Salt Lake City, Utah; am engineer and contractor, have been so engaged thirteen years. Attended an Engineering School two years; have been in the contracting business eight years. Was in the employ of the National Tube Company of McKeesport, Pennsylvania, for a year and a half; was superintendent of construction for the building of furnaces, foundation work and furnace construction. Then came west and worked for the Steptoe Valley Smelting and Mining Company in Nevada, was in the engineering department—started the contracting business in 1908. I am a member of the Lynch, Cannon Engineering Company. I have taken many contracts for concrete work. (Complainant offered as its Exhibit No. 72 a certified copy of the articles of incorporation of Union Portland Cement Company; also as its Exhibit No. 73 a certificate by the Secretary of State of Utah that said company is authorized to do business since March 8, 1906; also as its

(Testimony of James A. Lynch.)

Exhibit No. 74 certified copy of articles of incorporation of Corey Brothers Construction Company; also as its Exhibit No. 75 a certificate of Secretary of State of Utah showing company has been a corporation since 1902.)

During 1909 and 1910 I had the contract for all the concrete work for the Blaine, Lower Blaine, Era and Arco Canals. [370] Began work September 15, 1909, stopped June 1, 1910. Did the concrete work at the head of the Blaine Canal. Blue-prints were furnished by the Engineers Drummond and Hough. Never saw defendants' Trustees' Exhibit 6 before. Corey handed me a blue-print also. I got a complete set from Corey before I left Ogden. Others were furnished me as the work progressed by the engineers in charge. Plaintiffs' Exhibit 76 was furnished me by the engineers. 76 is numbered 145204-01, the same as on Defendants' Exhibit 6, is signed by W. H. Rosecrans. It purports to be a plan of the intake and controlling works of the Blaine Canal. It differs from Defendants' Exhibit 6 in that the wall next to the tainter-gate is shown to be five feet instead of 100 feet in length, as shown in 76. The spillway is shown as 125 feet instead of 150 feet as shown on 76. That wall was built 14 feet instead of 5 feet by order of the engineers in charge. The engineers also ordered that the tainter gate be built at the left of the spillway. That gate is not on my drawings at all. I was willing to build the wall 100 feet. I built the structure according to the plan. (Plaintiff's Exhibit 76.) I put in the Ante-

(Testimony of James A. Lynch.)

lope Creek crossing. I first saw Defendants' Exhibit 5 yesterday. Corey has shown me the plan which he said he received from the company, it is Plaintiff's Exhibit 77, numbered 145244-C 2, being the same number as Defendants' Exhibit 5. (Objected to as not rebuttal and as not properly proved.) Rosecrans' name is signed to 77. 77 differs from 5 as follows: The culvert shown as 6x2 replaces two culverts on Exhibit 5 each 6x2. 77 shows three gates into the canal 6x6. The central gate when lowered closes the inlet to the culvert leading underneath. Two other gates leading into the canal from the creek cause water to pass into the canal when the gates are lowered. Exhibit 5 shows four gate openings 6x6, allowing the water to flow in to the canal. When lowered they would shut the water out of the two culverts. The two center gates act [371] the same as on exhibit 77. The canal was not constructed according to either of those plans but according to a revised plan furnished by the engineers. (Plaintiff's Exhibit 78.) I did all the work under the instruction of Drummond and Hough, engineers for the B. L. R. I. Co. Plaintiff's Exhibit 78 calls for two concrete culverts 6x2. The gate openings leading thereto are 4x2 and two gates 4x2 to be operated from the top of the structure. When opened they allow the water of the creek to pass under the canal. When closed they allow the water of the creek to pass into the canal through two gates 4x2. Above these gates are curtain walls forming a part of the bank of the canal, allowing the water to

(Testimony of James A. Lynch.)

come in from Antelope Creek crossing. The water would rise to a sufficient height by backing up the creek. When we left the gates were not set in place. There were temporary gates there made of two-inch lumber. There was some saving in the construction of this crossing, the way it was constructed rather than according to the original plan.

I put in all the drops except 9 and half of 8. I had plans delivered by the engineers for those. Plaintiff's Exhibit 75 is the plan for drop one. Plaintiff's Exhibit 80 shows the flume drops 5, 6 and 8 in the Blaine Canal, got that from the engineers. Plaintiff's Exhibit 81 shows the flume drop as furnished me by the engineers to construct drop 2. Two piers were built at the upper end of this drop. I have no blue-print showing other drops.

I did the concrete work at the Blaine Stub. I first saw Defendants' Exhibit 10 yesterday, but an identical print was handed me by the engineers. The engineers in charge ordered the construction to be changed—gave me a revised print, Plaintiff's Exhibit 2. 10 shows four gate openings from the Blaine to the Lower Blaine 2x9 and five gate openings from the Blaine to the Era 6x5. No curtain wall above those gates. Plaintiff's Exhibit No. 82 shows five gate openings from the Blaine to the Lower Blaine [372] 4x6 with a curtain wall above and four gates from the Blaine to the Era 4x4, with a curtain wall above. I did this work under the instructions of the engineers of the B. L. R. I. Co. I understood Rosecrans was out there one time when I

(Testimony of James A. Lynch.)

was on the work. I didn't see him.

The height of the gates on Defendants' Exhibit 10 is nine feet, the walls of the embankment 10 feet, also the wing walls. The sectional area of the gates is about the same in 10 and 82. If constructed according to Exhibit 10, a flow overtopping the gates would be likely to break the banks, since they were only a foot higher.

The Darlington head-gate was put in by order of the engineers in charge, is not shown in any drawing except red pencil marks on the drawing. When we first built those works we did not make provision for the Darlington gate then, we cut two openings 3x3 through the wall six feet thick at the bottom. Darlington came down to drive us off. We had considerable trouble getting a permit to put our camp on Darlington's ground. He was antagonistic. The engineers in charge gave me a pencil sketch showing the gates that were to be cut through. They said this was a compromise and settlement with Darlington. The engineers said that Darlington claimed the company had no right to go across his land.

From the drops down to the bifurcation work the cost of putting in those logging-off piers would be about \$5,000. I was ready and willing to build them. The engineers said they had decided to omit them. I don't think they were necessary because there were no laterals leading out of the Blaine canal, except one, two miles above the bifurcation works. I saw plans for that gate and put it in.

I figured out the saving to the company by these

(Testimony of James A. Lynch.)

various changes made about \$30,000. [373]

Cross-examination.

The gates at the bifurcation works were so constructed that it was not possible for water to flow over the top of the curtain wall above the gates. We could go over a nine-foot gate with a wing wall and embankment ten feet high without destroying the embankment, provided there were no low places in the embankment. Where a canal is designed to have a nine-foot embankment it is universally customary to build a little higher to provide for settlement so as to have ample nine foot height when fully settled. If you had six inches of water running over four weirs, each five feet wide, that would amount to about 20 second-feet. To be accurate the area of the openings of the gates as shown in Defendants' Exhibit 10 would be 136 feet as compared with 120 on Plaintiff's Exhibit 82.

The opening from the Blaine into the Era Canal is shown on Exhibit 10 to consist of five gates, five feet high and six feet wide. The wing wall is shown to be ten feet above the bottom of the Blaine ditch. In case of a considerable volume of water coming down you could get a foot of water going over those five gates leading to the Era Canal and still have the water six inches below the embankment. As constructed the openings into the Era Canal are 4x4, four in number. As constructed with the curtain wall and those gates closed there would be no way for surplus water to go down the Era Canal—no automatic way; you would have to raise the gates. If,

(Testimony of James A. Lynch.)

therefore, the gates were closed through neglect or inability to reach them and an excess of water amounting to 20 to 60 second-feet came down the canal, it would be bound to go over the banks. You could have 40 second-feet going over the weirs into the Era and 20 into the Lower Blaine without raising the water more than six inches above the gates into the Lower Blaine with the structure made according to Exhibit 10.

I had no prior experience on irrigation structures. [374] I think an automatic arrangement for taking care of flood waters would be a good thing on a structure that would be in danger. Exhibit 82 was handed me by one of the engineers. It has no signature purporting to be Rosecran's. I had a blueprint like Defendants' Exhibit 10 when I went to work there.

One of the objects of logging-off gates is for repair work but it would be impossible to log-off at any particular point unless you shut off at the head, since there were no laterals. There was one small ditch below all the drops. It is entirely conceivable that other drops might be put in. The logging-off gates could now be put in without reconstructing the head. It is not hard to attach a slot to a completed concrete structure. Exhibits 80 and 81 show two piers in each one of the flume drops. We put piers only in the drop numbered 2. The engineers said not to put any piers in drops 4, 5, 7, 8 and 9. It was Mr. Hough. He gave us a verbal order. Exhibits 79, 80 and 81 do not purport to be signed by Rose-

(Testimony of James A. Lynch.)

crans or anybody. On Plaintiff's Exhibit 76 there is no tainter gate shown through the spillway. This Exhibit 76 was furnished me by the engineers. I claim it is signed where I placed my initials. I do not know Rosecrans' signature; am not an expert on handwriting. That alleged signature on 76 looks to me very similar to the one on 6.

I never before yesterday saw a drawing like Defendants' Exhibit 5. Both in Plaintiff's Exhibit 77 and Defendants' Exhibit 5 a concrete wall is shown extending several feet above the bottom of the canal and two feet below the top of the wing wall. The "Front Elevation" on 77 means the gates opening downstream. You get a view of them looking toward the structure from upstream in the creek. "BB" indicates a cross-section through the structure two feet back of the gate. The structure was not built like 77. Hough ordered it constructed differently. The drawings were handed to us by his [374 $\frac{1}{2}$] assistant, Mr. Beckwith. The structure was built like Exhibit 78, which is not signed by anybody. As constructed the canal had two culverts underneath 6x2, the same as shown on Exhibit 5. Above that the structure consisted of three piers, two wing walls and two gate openings into the canal 4x4; above that a wall. The bottom of those two openings were at the bottom of the canal; that was so on both the upstream and downstream side of the structure. Those 4x4 openings, two on each side, were the only openings into the canal. Four gates open into the two culverts underneath, two into each

(Testimony of James A. Lynch.)

culvert. In order to put water into the canal from the creek you close all the gates leading into the culvert and open the gates into the canal, thus raising the water in the creek. I never saw that stream dry. The canal began about two miles above this point. The gates on the upper side of the canal were to be closed in case you didn't want to take water from the creek, that water would then go underneath. If the water in the creek was too much to go under the culverts, it could be taken into the canal. If the gates were closed, of course, it would flow over the banks, if the culverts wouldn't carry it all. I think those two openings 2x6 ought to carry all the water. If the four culverts wouldn't take all the water, then the water would rise up and flow over the sides of the structure if the gates were closed. If you had this construction like Exhibit 77 and had no gates at all on the upper side, except a gate closing the culvert underneath, then there would be that automatic safety action.

I never saw Rosecrans on that work at any time. I don't think I ever saw Darlington around with a gun, or any other weapon of warfare, except his voice. I heard the engineers say that by putting in those gates they settled their difficulties with Darlington. Drummond said that. He gave me [375] no order in writing to put those gates in.

Redirect Examination.

That 125 foot weir with five feet of water going over it will carry about 5,000 second-feet. Drummond saw us putting in the Antelope Creek crossing,

(Testimony of James A. Lynch.)

talked with him about it. There are no gates on the downstream side of Antelope Creek crossing, all earth embankment. We put in the Antelope Creek crossing in March and April, 1910.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, recalled on behalf of plaintiff, testified as follows:

I met Rosecrans and Speer in Denver the 19th of April, 1909. Didn't ride with them to Boise or Pocatello but only to Green River, Wyoming. Left Denver at 7 P. M., got off about 10 A. M. the next morning. I talked with them about the building of the Big Lost River works. They didn't tell me anything about how they expected to raise the money. They didn't say they were going to issue bonds secured by trust deeds and get contracts of farmers to put up to secure the bonds. Didn't say anything about the money. Didn't talk with Rosecrans and Speer about money matters. Rosecrans told me that Trowbridge and Niver was a strong concern financially. In February, 1910, I had a letter enclosing a couple of notes. That was the first I knew about bonds.

Mr. Coy, the engineer, staked out the borrow-pits. The nearest part of those pits to the toe of the dam was 179 feet. Defendant's Trustees' Exhibit 35 shows the borrow-pits. The one nearest the river had double track. The nearest point of this first borrow-pit is where I put a pencil dot. The next borrow-pit above that, the nearest point is 175 feet

(Testimony of W. W. Corey.)

from the dam, the third 190. I made these measurements on the 11th of this month. The conditions were the same as when I quit. The part between the lowest borrow-pit and the [376] dam was removed to get in the tracks. In all instances the borrow-pit is higher opposite the dam than the toe of the slope. Frank Coy, the engineer, staked the core-wall. Those stakes called for a trench about 6 or 7 feet deep. I couldn't tell exactly. The trench is built according to the stakes. It would have been better for us to have wasted the rock from the tunnel, so we could have been paid for the yardage of dirt. Rosecrans was out there when the rock was being dumped out of the tunnel. He said nothing about it. I should judge Rosecrans was out there about four or five times during the summer. He lived in Chicago. To get on the downstream side of the core-wall from the gravel pit, it is necessary to cross the core-wall at the last part of it. Defendant's Trustees' Exhibit No. 35 shows the track nearest the river where we were dumping when we were shut down. There was very little dirt dumped north of the core-wall—maybe 500 yards across there.

When I was at the dam on the 11th of this month I saw test-pits that Storrow had dug, they were still open—two above and one below the core-wall. The one below the core-wall and about four feet from it is about 25 feet deep. It was dry when I was there. One test-pit was four feet above the core-wall, 20 feet deep. That was dry. Another was about 50 feet from the core-wall and 50 feet from the edge of the

(Testimony of W. W. Corey.)

spillway. There was water in the spillway. That hole was 12 feet deep. Its bottom was below the water in the reservoir. The bottom of all those pits is below the water in the reservoir. They were all dry; all below the top of the water in the reservoir 5 to 20 feet. I had with me a couple of grandsons and John B. Henderson, who helped me make this inspection. In wetting the portion of the dam required to be wet, I acted under the engineer in charge of the work. Raschbacher ordered one pump. We had two before that. Raschbacher was in [377] charge of all the work. (Telegram from Raschbacher offered in evidence as Plaintiff's Exhibit No. 83.) The other pumps we had when we went to work. We did this wetting in accordance with the instructions of the engineer in charge. I received this letter from Raschbacher relating to the pump. (Letter offered in evidence as Plaintiff's Exhibit 84.) I wrote to Rosecrans about changing engineer Coy. That was October 28, 1909. This is a copy of the letter which I handed to Rosecrans personally. (Letter offered in evidence is Plaintiff's Exhibit 85.) I received a response from Rosecrans, which is Plaintiff's Exhibit 86. (Offered in evidence.)

On or about May 29, 1909, I received a letter from Rosecrans about the plans and specifications which is Plaintiff's Exhibit 87. (Letter offered in evidence.) On or about March 3, 1910, received letter from Rosecrans stating that he had shipped certain tainter gates for the Blaine Canal. They were put in in the spring of 1910. (Letter offered as Plain-

(Testimony of W. W. Corey.)

tiff's Exhibit 88.) On or about August 18, 1909, I received a letter (Plaintiff's Exhibit 89) from the Arnold Company. (Letter offered.) On or about August 24th, 1909, I received a letter from Arnold & Company about cement. (Plaintiff's Exhibit 90.) (Letter offered in evidence.) (Letter from Raschbacher offered in evidence as Plaintiff's Exhibit 91.) On or about July 8, 1909, I received letter from Trowbridge & Niver, which is Plaintiff's Exhibit 92. (Letter offered.) On or about February 12, 1910, I received a letter from G. S. Speer, which is Plaintiff's Exhibit 93. (Letter offered.) On or about March 12, 1910, I received a letter from Trowbridge & Niver, which is Plaintiff's Exhibit 94. (Letter offered.) On March 29, 1910, I received a letter from Trowbridge & Niver, which is Plaintiff's Exhibit 95 (Letter offered.) [378]

Coy was relieved about the middle of November. He was there three or four weeks afterwards. 360 lineal feet of piling were driven. We furnished the plant under the direction of Coy and then Greeley, his successor. We paid the men and got our ten per cent. Raschbacher sent to Denver for the engineer and foreman. Coy hired and discharged men for that work.

We plowed all the ground under the dam except the river bed. Some we plowed three or four times. The puddling was done with a pump. The company's engineer was there all the time during this work. They told us about puddling, what to puddle and where to puddle. The material for the back-

(Testimony of W. W. Corey.)

filling of the trench was hauled from the bottom of the stream. Coy said that was a good place to get the material.

I probably had a talk with Binkley during the summer or fall of 1910, about the water coming through the dam. I didn't tell him where I thought it came from, or where it did come from, *because I didn't know then and I don't know yet*. That dam is not completed.

I was never informed at a meeting with Clinton Hurtt Co. or anybody else, where the land opening was talked about at Arco. On October 28, 1909, I made a trip of inspection with Rosecrans to the head of the Blaine Canal. Some of the cement work was put in at that time. I should say two-thirds or three-fourths. He said the work was all right—first class.

I was in Chicago in July, 1910. I talked with the Arnold people and with Rosecrans. Don't recollect any comments on the work at that time. I haven't had any talk with any of the Arnold people or Rosecrans, except as I have testified relative to the way the work was done.

I received Plaintiff's Exhibit 76 from the Arnold Company. I received another map from them Numbered [379] 145204-C1, which is Plaintiff's Exhibit 96. (Offered in evidence.) Rosecrans was the chief engineer during the whole time that I had any work to do. I went to the State Engineer and got the record of puddled waters from 1907 to 1911. For 1907 for the Big Lost River 2610 second-feet; 1908-2030; 1909-2880; 1910-870; 1911-3420.

(Testimony of W. W. Corey.)

On the 11th of this month (May, 1911) I looked at the concrete facing of the dam, found only one crack, and that was about one-fourth of an inch in width extending 15 feet above the water. Don't know how far below it. It does no harm as it is. I saw Rosecrans in Boise about the concrete facing and also about the tunnel. I told him that the price for concrete work wasn't enough for that thin facing. He said do it at that price or leave it. I said I would do it. The spillway tunnel was originally laid out as an open cut, but they changed the plans to a tunnel so we agreed on a price for a tunnel. That saved the company from \$3,000 to \$5,000. I was ready and willing to make an open cut, also to waste the rock from the tunnel, also to obey the engineer in charge.

Cross-examination.

It is 107 miles from Denver to Cheyenne.

I knew this was a Carey Act project. I didn't know the only way the Irrigation Company could get money was by the sale of water contracts. I didn't figure out how they were going to get money. Didn't think they would pray for it. I don't know anything about how they could get it. I merely looked up the parties. Speer said Trowbridge & Niver were a wealthy concern.

Looking at Defendant's Exhibit 35, I should say the distance from the excavated bank to the water is 40 to 50 feet. My pencil mark is 190 feet from the toe of the dam. The bank there is 10 or 12 feet high. The borrow-pits in all instances [380] at right

(Testimony of W. W. Corey.)

angles to the fill is higher than the toe of the slope. The ravine came down here from Cedar Creek, where Rosecrans told Corey to start. The first borrow-pit is excavated to a width of 40 or 50 feet up to about 30 feet of the dam. That lower borrow-pit at its lowest part is 200 or 300 feet. I never made any request that Drummond be removed as engineer, or Raschbacher. I gave Raschbacher a diamond ring. I didn't give Mr. Coy any diamond ring, or shotgun or anything. When Coy staked out the trench he indicated the depth by marks on a stick. I gave Raschbacher the ring "just as a friendly act." I wanted to be on pretty good terms with him thinking he might assist me with information or something about another job. The excavated rock from the tunnel was just dumped down the cliff. I got this letter from Raschbacher just as we commenced this excavation. It would cost a little more but not much to waste the excavated rock than to put it in the fill. This work was sublet on a yardage basis after we got the letter from Raschbacher. When I say Rosecrans was on the work four or five times during the summer, I mean the summer of 1909. Speaking of that pit four feet below the core-wall, I can't say positively if it extended lower than the original surface of the ground, nor can I say positively whether the one immediately north of the core-wall extends below the original surface, but I think they both do. The other one 50 feet north of the core-wall, I think, was all in the fill. I think there was about 20 feet of water in the reservoir. I think the shallowest pit

(Testimony of W. W. Corey.)

was about 50 feet from the spillway, and that the fill there is about five feet above the water in the spillway. I took no levels—just observation. I should say the test-pit near the core-wall was 25 feet farther from the spillway and that the fill there is 10 feet [381] higher than the water in the spillway, and that the test-pit below the core-wall was between the other two and that the fill was about the same height there. I should say the water in the reservoir was 20 to 25 feet higher than the water at the lower toe of the dam.

In wetting the material dumped into the dam a stream of water was thrown on the material as it was dumped on the incline, so as to wash out the finer particles down toward the center; that was the object to wash it toward the core; that was my understanding of what the contract required. I didn't do any sluicing unless the engineer told me to, nor very much wetting, because it is supposed to be done under the direction of the engineer.

I first learned on February 4, 1910, that the company was getting money from the sale of bonds.

I had no foreman on the pile-driving job. Raschbacher sent to Denver for a foreman and engineer. We might have talked about somebody to do it before they started. He sent to the Denver office to send a foreman and engineer.

During 1909 I was there at the dam about half the time. Was not there during much of 1910. The whole of the base of dam was plowed in 1909. The engineer told us where the puddled zone was to begin

(Testimony of W. W. Corey.)

and we knew it already, of course. I wouldn't say we only puddled where the engineer told us to. I would say we puddled as much as he told us to. I was preparing for more puddling before we put the extra pump on. We needed an extra pump because we were doing more puddling. I think the pump was a two-inch pump. In back-filling the trench we used material other than the material from the borrow-pits, that was to get imperviousness. I think it was impervious before we dug it out. I understood the object of this puddling near the core-wall was to get imperviousness there. [382]

I didn't tell Binkley where I thought the water was coming through. It came through all along the gravel-pit next to the bank. I don't recollect telling Binkley about the rocks dumped in above the core-wall and a concrete floor wall being put in. There were two tracks running into each borrow-pit and about eight feet excavated for each track.

I think it was October, 1909, that Drummond succeeded Raschbacher.

Redirect Examination.

I gave that diamond ring to Raschbacher about Christmas, 1909, after he had quit this work. I don't know how much I paid for it. This Darlington gate was put in because Darlington requested it. He came down to our camp and tried to drive us off. The top of that dam is in the same condition as it was when we quit work, with the exception that the State has built a spillway. There are no marks on the top of that dam that I can see indicating railroads built

(Testimony of W. W. Corey.)

across the core-wall from which gravel was dumped.

The reason I asked that Coy be removed was because he had a controversy with my foreman and I came along and Coy said: "Corey, if you don't make this man do as I tell him, I will shut him down in a minute." I said, "What is the matter?" and he said, "This man don't obey my orders." I said, "If he don't obey your orders, I will make him lose his job." I said, "You don't need to ask anything more of me, if you will let me know what you want." That was the substance of it. I wrote the letter the next morning.

C. D. Chapin was Carey Act Inspector of Idaho in 1911. I got a report from him dated April 19, 1911, as to the water coming through the dam. Chapin is dead. (Letter offered in evidence as Plaintiff's Exhibit 97.)

Recross-examination.

I have given the grounds of my requesting the removal [383] of Coy, that was all there was to it. I considered that sufficient grounds to remove this young man.

I was in Chicago when this Chapin letter was written. I don't know who requested Chapin to write the letter. I don't know how much water was in the reservoir at the time Chapin made his observation, or whether the outlet tunnel was open, but presume it was. The weir was just below the dam. This weir was eight feet long and a foot and a half or two feet high.

[Testimony of John T. Henderson, for Plaintiff.]

JOHN T. HENDERSON, a witness for complainant, testified as follows:

I live at Arco. I am operating the canal system of the Big Lost River Irrigation Company under the Receiver. I have been at that since June, 1911. I am an engineer by profession, have studied engineering for two years in the Pennsylvania Military College; didn't graduate. I have been cement inspector for the War Department two years. I was at the Mackay Dam the eleventh of this month with Mr. Corey; was there several times before that, not while the work was going on. I examined the upper face of the dam after the cement was put on. The condition was practically the same as now except that there is one crack an eighth of an inch wide and ten feet long above the water—not a serious crack. I was inspecting with Mr. Corey at his request. I measured the borrow-pit—the one next to the river. The toe of the dam is 190 feet from the borrow-pit. No. 2 borrow-pit is 175 feet from the toe of the dam; No. 3 is 190.

I examined some test-pits, two above and one below the core-wall. They were dry. The one near the core-wall, I should judge, extended 15 feet below the water in the reservoir. The test-pit nearest the core-wall is about 20 feet deep and from 10 to 15 feet deeper than the water in the reservoir, I [384] should say. Another test-pit was located near the center of the river and about 50 feet from the core-wall, that was about 12 feet deep and dry. This

(Testimony of John T. Henderson.)

bottom was lower than the water in the reservoir, a little bit, not to exceed five feet, I don't think.

I noticed the surface of the dam to see if there was any indication of railroad tracks having been built and removed, where gravel had been dumped parallel to the core-wall. I didn't notice any. I took some photographs of the canal system, that is they were taken under my direction in the fall of 1910, for a man named Stanton, a bondholder from Honolulu. Here is one marked "Bifurcation Works and Blaine Stub." That was taken before it was wrecked. The back one there was not complete. The cement was a good job. (Picture offered in evidence as Plaintiff's Exhibit No. 98.) The picture of Plaintiff's Exhibit 99 shows the Darlington head-gates in October, 1910. The cement work was good. The concrete work was good on the 70-foot drop in the Blaine Canal shown by photograph, Plaintiff's Exhibit No. 100. The concrete work at the outlet gates of the Mackay Dam is good, shown by photograph, Plaintiff's Exhibit No. 101. The work at the Blaine head-gates is good concrete work, also the sluice-gate; also at the bifurcation works. I have seen the wreck at the Blaine Stub; it was caused by an excess of high water. The works were not filled in at one place before the wreck occurred; that was on the upper side at the intersection of the river embankment with the wing wall. The water came from Antelope Creek. The siphon up above was plugged. I was there the next day after the wreck at the bifurcation works. We couldn't tell then what was the cause of the wreck.

(Testimony of John T. Henderson.)

I am satisfied it was caused by not being filled in at that point. Gravel and sand filled up one of the siphons under the canal at Antelope Creek. It was cleaned out under my supervision. I don't believe that would have occurred if the gates at Antelope Creek had been properly attended to. The water went down the canal from Antelope Creek. The gates at Antelope crossing were one open and [385] one shut. One was partly down so that no water was going through and one was partly raised so that the water was going through. The siphon was stopped up after the gates had been opened. Plaintiff offered photographs marked Plaintiff's Exhibits 102 to 106, inclusive.

Cross-examination.

It was the lower crossing of Antelope that was stopped up, that is one opening in the lower one was stopped up. Two of them were stopped totally and two partly with sand and gravel. It took them ten or fifteen minutes to get stopped up. I tried to close the Antelope gate that was open leading into the canal; that was immediately above the floor of the canal. There was a flood in the creek. Part of the main canal bank is wrecked at Antelope crossing, but not the concrete work; that was caused by the opening of that gate. The siphon wouldn't have been filled up if the gate had been closed. The sudden opening of the gates caused the rush of sand and gravel behind. I caused the gate to be opened to try to save the canal system; otherwise I think the lower bank of the main canal would have gone by the water

(Testimony of John T. Henderson.)

shooting clear across from the pressure behind it through the partly open gate. If both gates had been closed the water would have gone through the siphon. This one gate being partly open and the other closed made the water shoot across the canal and was scouring out the lower bank, therefore I opened it. I tried to close it but couldn't. The opening cut down the pressure of the water against the gate; prevented the lower bank from going out. The head was relieved from behind the gate. There was probably a couple of feet of water in the canal. By opening the gate and relieving the pressure it caused the water to stop shooting across the canal and let in a good deal more water; that relieved the pressure against the lower bank and the pressure being decreased against the gate, carried the sand and [386] gravel into the siphon. My idea is that when I suddenly opened the gate that decreased the velocity of the water and caused the sand and gravel to settle. I opened both gates. By increasing the outlet of that water it decreased the velocity. That gate before I touched it might have been open a foot or two feet. I opened it the full height of four feet. The water had risen before I opened the gate to about ten or eleven feet from the bottom of the creek. It was up on the curtain wall probably three or four feet below its top. The curtain wall was probably five or six feet above the gate. The water had probably risen when I went there about two feet above the top of the opening in the gate that was partly open. After I opened those gates the water fell a number of

(Testimony of John T. Henderson.)

feet. I believe the siphons were sufficient to carry that amount of water. I think the water could still rise and still be going through. I think by opening the gates the velocity of the water was decreased. I think the large amount of water I let in is what caused the wreck at the bifurcation works. I think the place where there was no back-filling was at the extreme north end of the wing wall on Defendant's Exhibit 3. The bank was not filled up to the end of the wing wall at that point. There might have been a three-foot hole there. That was the place where the water went over. If the bank had been a foot higher up to the wing wall the water wouldn't have gone over. Looking at Plaintiff's Exhibit 98, the left bank appears to be of uniform level up to the wing wall except one point at the intersection of the bank with the concrete wall. I can't see a continuous crest there, that is on the other side of the canal. You can't see the right bank of the canal at any other place on this picture except the one that I mention.

I spent one afternoon with Mr. Corey on the 11th of this month up there—probably three or four hours. I measured the distance between the lower borrow-pit and the [387] upper toe of the dam. The excavated portion leading from the upper toe to the borrow-pit is between 25 and 50 feet, probably. I am an amateur photographer. I know that if you take a photograph pointing your camera across the street, the street appears to be narrower than it is; and that if you take a photograph from the middle of the street looking up or down it, the street appears

(Testimony of John T. Henderson.)

wider than it is. The lower borrow-pit at the widest part might be all the way from 50 to 100 feet. I wouldn't be surprised to know that the lower borrow-pit is 300 or 400 feet wide. Taking the point marked with the letter "a" over to "b" that might be as far as from this pencil mark to the toe of the dam.

I am 26 years old. Pennsylvania Military College is at Chester. I was there when I was sixteen years of age. Before that I had got part way in the first year of the High School. I took two years of the engineering course. I didn't study any engineering suppose that two years, just mathematics. I didn't have any engineering training in school. I got a job with the Government at the age of 18. I measured the two upper borrow-pits about as accurately as I measured the lower one. I never studied surveying in school, have absorbed it along the way. When I was at the dam site, I didn't take any levels of the water. I couldn't tell from the looks whether the pits extended below the original surface of the ground. Didn't take any levels of the bottoms of the pits. I can run levels. The water in the reservoir I think is about 25 feet above the water at the lower toe. Think the top of the fill where the pits were dug was five to ten feet above the water in the reservoir. I couldn't say for certain whether a line drawn from the water level at the upper face of the dam to the water level at the toe of the dam would be above or below the bottom of the test-pits. Think it would be above. On Defendant's Exhibit 44 I see one test-pit that I have been talking about. I

(Testimony of John T. Henderson.)

wouldn't [388] be positive whether the fill at that point was at least 25 feet above the water in the spill-way opposite the core-wall. The diagonal fill might be 25 feet high. I am sure the fill where the test-pits are is more than five feet below the top of the diagonal fill.

When I identified these various photographs and said that the work was good, I referred to the character of the concrete work, not to the efficiency of the structures for the purpose for which they were designed.

The Antelope Creek crossing is between ten and twelve miles from the bifurcation works.

Redirect Examination.

Those head-gates I tried to raise in Antelope crossing were temporary wooden gates. I think the siphon would have carried the water if I had been able to get the gate closed.

[Testimony of W. W. Corey, for Plaintiff (Recalled—Cross-examination).]

W. W. COREY, recalled for further cross-examination, testified as follows:

On March 17, 1910, I wrote the letter to G. S. Speer marked Defendants' Exhibit 81 and received in reply Defendants' Exhibit 82. On March 23d, I wrote Defendants' Exhibit 83. On April 3d, I wrote Defendants' Exhibit 84. I received Defendants' Exhibit 85; also Defendants' Exhibit 86; also Defendants' Exhibits 87 and 88. (The above exhibits offered in evidence.) My purpose in making the

(Testimony of W. W. Corey.)

diagonal lift or fill which appears in the foreground of Defendants' Exhibit 85, was in order to fill up the track as we went along, to make the track stronger because the trestle was not strong enough. That was the sole reason. We could have built parallel to the core-wall on the lower side and filled from that if we had made the trestles strong enough. Above the core-wall, as I recollect, there was no trestle. We excavated in the edge of the bank and [389] then when we ran out there we dumped a few cars. I wouldn't be positive there wasn't any trestle above the core-wall.

Looking at Defendants' Exhibit 44 and Defendants' Exhibit 35, I can't figure it out that they show the same fill from different directions. I can't tell anything about it.

One of the test-pits I examined on the 11th of this month was between the State Spillway and the diagonal lift and the other two were beyond that diagonal lift. I should say the foot of that lift is in all about 25 feet from the State Spillway.

A line drawn upstream at right angles to the core-wall leading from those test-pits near the core-wall would strike the first borrow-pit.

[Testimony of W. S. Collins, for Defendants.]

W. S. COLLINS, a witness for defendants, testified as follows:

I am a civil engineer and have been for seven years. Got my training at the State University of Colorado and the Colorado State School of Mines; studied civil engineering three and a half years. I am now em-

(Testimony of W. S. Collins.)

ployed by James A. Green & Company at American Falls as an engineer. On Saturday evening last I was requested by Mr. Day to go to the Mackay Dam site and look for three test-pits. I went up. I examined the test-pit above the core-wall and between the first diagonal fill shown on Defendants' Exhibit No. 25, and the spillway. I have marked with a cross about where the hole is. That was 72 feet from the spillway. I didn't measure the distance from the lower edge of the diagonal fill but it was 15 to 20 feet. It was 80 feet upstream from the core-wall; that was the only test-pit in that vicinity. I measured the distance from that to the spillway. The pit was 11.6 feet deep. There was no water running through the spillway. There was one little pool standing in it less than a foot deep. There was no water in the pit. I took the top of the core-wall there as a bench mark and assumed [390] an elevation of 100, and the water in the reservoir stood at elevation 95. The bottom of the test-pit was at elevation 89.6. The elevation of a line drawn from the water in the reservoir at the top end of the spillway to the level of the pool below the lower toe of the dam, the upper end would be 95 and the lower end 76.9. This pit was 129 feet below the nearest point of the reservoir. If there was any water immediately upstream from that pit, it would be very little and very shallow. If that pit were on a line between the reservoir and the lower toe of the dam, a line drawn from the surface of the water in the reservoir to the surface at the lower toe would be two feet above

(Testimony of W. S. Collins.)

the bottom of the pit. In view of the fact that this test-pit is not between those points, I would not expect to find any water in the pit if the fill were previous. I discovered no other pits there within 150 feet of the State Spillway. I was told to look for pits within 100 feet of that spillway. I didn't measure the distance between the State Spillway and the diagonal track on exhibit 35, but I did measure the distance between the corner of the core-wall projecting from the side of that fill nearest the spillway to the spillway and found it to be 132½ feet. It was about 10 or 15 feet from that corner back to the track. Assuming that there are holes over there more than 150 feet from the State Spillway beyond that diagonal fill shown in exhibit 35 and that a line drawn upstream from them and at right angles to the core-wall would strike in the first borrow-pit, I would not expect to find any water in those test-pits even if the fill is not impervious. I spent nearly two hours at the dam. Took levels at all those places I have mentioned with instruments. I found two pits below the lower toe of the dam. One was practically at the toe and one ten feet from it. The elevation of the ground at the lower pit was 92.2 and at the upper 97. One of those pits was dry and the other had 3.6 feet of [391] water in it. That was the one where the elevation of the ground was 16 feet above the pool at the lower toe.

The lower borrow-pit came practically to the toe of the dam.

(Testimony of W. S. Collins.)

Cross-examination.

(By Mr. HENDERSON.)

Q. This, where you have drawn this mark, you took that to be the borrow-pit?

A. I took that to be the borrow-pit; yes, sir.

Q. You don't know whether the borrow-pit commenced away up here where there is a lead pencil mark, right at the end of my finger?

A. I don't know what was done with the material that came out of here.

Q. There were two tracks there, were there not?

A. I didn't notice.

Q. Did you notice a water tank?

A. Yes, sir.

Q. That is still there, and there is a double track there, isn't there? A. Well, I didn't notice.

Q. And you say where you have drawn that line there it is 20 or 25 feet across, you should judge?

A. It is at least that much; it may be more. I have no clear recollection.

Q. Well, I am just asking your best recollection, that is all. You didn't find any test-pits below the core-wall about four feet from it, from the core-wall?

A. No, sir.

Q. And these two test-pits that you say there was water in, they were on the outside of the lower toe of the wall? A. Yes, sir. [392]

Q. And not in the dam at all? A. No, sir.

Q. And that is in the bed of old Cedar Creek, isn't it?

(Testimony of W. S. Collins.)

A. No, they are above the bed, they are on the side slope.

Q. Now, in making your measurement of the test-pit that is above the core-wall, do you assume, in taking your levels, that the top of the core-wall is 100?

A. Yes, sir, the top of the core-wall at the point noted.

Q. And from that point the top of the water was 85? A. 95.

Q. 95, that is to say, how much lower would the water be than the top of the core-wall?

A. Five feet.

Q. And the bottom of this test-pit above the core-wall would be 89, you say?

A. Eighty-seven, I believe, $87\frac{1}{2}$.

Q. Eighty-seven and a half? A. Yes, sir.

Q. So the bottom of that test-pit would be $12\frac{1}{2}$ feet lower than that point which you took for 100 on the core-wall, is that right, or $11\frac{1}{2}$ feet lower?

A. Yes.

Q. Then the bottom of that test-pit would be $7\frac{1}{2}$ feet lower than the water in the reservoir?

A. Yes, sir.

Q. And you say that pit was dry? A. Yes, sir.

Q. Who was it asked you to go up there?

A. Mr. Day.

Q. Engineer? A. Yes, sir. [393]

Q. What are his initials? A. W. F.

Mr. HENDERSON.—Q. Mr. Miller, will you admit that Mr. Day telephoned Mr. Collins at your

(Testimony of W. S. Collins.)

request to make these measurements?

Mr. MILLER.—Yes. I will swear to it if you want me to.

Mr. HENDERSON.—Oh, no; I supposed he did, which was all right. That is all.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, being recalled, testified as follows:

The test-pit referred to by Collins at the lower toe of the dam is in the bed of Cedar Creek.

[Testimony of William M. Wayman, for Plaintiff.]

WILLIAM M. WAYMAN, a witness for plaintiff, testified as follows:

Direct Examination.

(By Mr. HENDERSON.)

I live in Boise. In the summer of 1910, I was in Chicago from January first up to about August 1st, with the exception of a few trips out. I was there when I heard work had been stopped on the Big Lost River project. I know W. H. Rosecrans and Ralph Arnold, Secretary and Treasurer of the Arnold Company. I talked with both in Chicago. Newspaper reports kept coming in of conditions at Mackay and the work being stopped by the State, and the claim of political influence, and other reservoir sites being offered for sale. I asked Rosecrans if the work was as contracted—up to specifications. He said it was in every particular and was first class. I don't remember whether Hurtt was present. I was with Rosecrans quite often.

(Testimony of William M. Wayman.)

Cross-examination.

(By Mr. MILLER.)

I am vice-president of the Northwestern Investment Company, [394] which is in the farm loan business in Boise. In 1910, at the time of which I speak, I was handling the sale on the Conrad project, Teton County, Montana. I was interested in the Big Lost River matter on account of Clinton, Hurtt & Company being sales agents and the course it was pursuing was cutting off the sales. I had stock in Clinton, Hurtt & Company; that was my interest. I still have the stock and am an officer of the Company. I did not know the Clinton, Hurtt Company were to get some of the stock of the Big Lost River Company. I never saw Ralph Arnold out here on the ground. I know nothing about it, whether he was ever up at the Big Lost River project or not. Never heard he was or wasn't. I don't know how often Rosecrans was there. I am not able to say just when he was there. He represented that he was in charge of the work at all times. I think about August, 1910, he withdrew from the Arnold Company. It might have been the fore part of August. The talks I had with him were both before and after he withdrew. After he withdrew I don't know that he had any connection with this project. The talks I have had with him at some of which he made statements that I have mentioned, covered a period both before and after he left the Arnold Company. In my talks with Ralph Arnold and Rosecrans I was trying to get the real status of affairs, so that

(Testimony of William M. Wayman.)

if there was anything radically wrong Clinton, Hurtt & Company could stop spending money on the campaign to sell the land. I was representing Clinton, Hurtt & Company. My interest in the matter was my interest in Clinton, Hurtt & Company. I didn't represent Corey.

Redirect Examination.

(By Mr. HENDERSON.)

At that time the Big Lost River Irrigation Company owed Clinton, Hurtt & Company about \$200,000.00. I was interested in finding out whether Corey Bros. Construction Company had done their [395] work. My interest was solely because of my interest in Clinton, Hurtt & Company. Mr. Hurtt was trying to get other people financially interested

Recross-examination.

(By Mr. MILLER.)

The \$200,000.00 which the Big Lost River Irrigation Company owed Clinton, Hurtt & Company was for commissions on land sales. We were expecting every day that Trowbridge & Niver Company would be closed up, but they were not.

[Testimony of C. B. Hurtt, for Plaintiff (Recalled).]

C. B. HURTT, recalled on behalf of plaintiff, testified as follows:

I was in Chicago in the summer of 1910 for about three months and at the time when work was shut down on the Big Lost River Irrigation Company project. I talked frequently with Ralph Arnold and W. H. Rosecrans. Both Rosecrans and Arnold

(Testimony of C. B. Hurtt.)

claimed the work was all right in every particular and always have in their conversation with me. Rosecrans claims the work was done according to plans and specifications, said the work was satisfactory. I remember particularly about the work on the canals. He said it was unusually good. Rosecrans and I spoke to Mr. Bradford and Mr. Starr about putting money into this project. Rosecrans said to them that the work was done according to plans and specifications and in a substantial manner. I, as President of the Big Lost River Irrigation Company, never complained to Corey Bros. Construction Company that the Company did not do its work according to plans and specifications. None of the directors have objected to my knowledge. The directors were, as I recollect, Mr. Clinton, George S. Speer, Louis N. Roos, myself—don't remember the others.

Cross-examination.

(By Mr. MILLER.)

I, as President of the Big Lost River Irrigation Company [396] never assumed to give any directions about this work up there at all, never assumed to accept or reject it. The Board of Directors of the Big Lost River Irrigation Company never assumed to give any directions as to this work or to accept or reject it, to my knowledge. I don't remember the Board of Directors ever authorized the payment of any money on account of this project, or ever passed on a single estimate. I think perhaps one estimate was submitted to the Board, or to me

(Testimony of C. B. Hurtt.)

as President. I think it was in the early stages of the work; that was about the time the Big Lost River Irrigation Company was organized. We did not assume to pass on that at all. The estimates went directly to the Arnold Company and were approved by them and sent to Trowbridge & Niver. As a matter of fact the officers of the Big Lost River Irrigation Company had practically nothing to do with the work, the manner in which it was done, the approving of the work or the taking of the estimates. When I had these talks with Ralph Arnold and Rosecrans I represented Clinton, Hurtt & Company. I didn't represent Corey. Reports were coming in that the State was making complaints about the work on the dam and was about to stop it, and finally did stop it. And I as a member of Clinton, Hurtt & Company and for the Big Lost River Irrigation Company was interested in knowing whether the project was going to be promptly completed. I therefore talked with these men as to how it was going on. I don't know whether Ralph Arnold was ever on this work or not. I never heard he was. I never heard he claimed to be an engineer. Don't know whether he is, and never heard him spoken of as an engineer. I don't know of Rosecrans having been upon the ground after September, 1909.

Redirect Examination.

(By Mr. HENDERSON.)

The Big Lost River Irrigation Company still owes Clinton, Hurtt & Company more than \$200,000.

(Testimony of C. B. Hurtt.)

(Here follows a statement [397] of the directors' meeting and the subjects considered.)

Recross-examination.

(By Mr. MILLER.)

In 1910 I was in Chicago, early in July, and remained until some time in September. It was about the first of August that Rosecrans severed his connection with the Arnold Company. I had many talks with him, some before and some after that. The conversations I have detailed took place at some of those talks.

**[Testimony of W. W. Corey, for Plaintiff
(Recalled).]**

W. W. COREY, being recalled, testified as follows:

Direct Examination.

(By Mr. HENDERSON.)

These notes I have testified about are simply held as collateral security for the account that the Big Lost River Irrigation Company owed us. Didn't give them credit on the books. I returned the notes to Trowbridge & Niver at their request. The interest which is spoken of in one of those letters I credited upon the account of the Big Lost River Irrigation Company as soon as received. Didn't credit it as interest on the note. Think it was about three hundred and some dollars. I advised Speer of Trowbridge & Niver that I could not credit the Big Lost River Irrigation Company with those notes; that if I could dispose of them, I might use them,

(Testimony of W. W. Corey.)

but not otherwise. He said not to do that; didn't want his paper hawked about. Didn't use those notes.

Cross-examination.

(By Mr. MILLER.)

I don't recall that I had any letter requesting that those notes be sent back to Trowbridge & Niver. Whatever request was made might have been by letter. I don't remember having any conversation to that effect. We tried to collect one of the notes, and as we couldn't, thought they were useless—we returned [398] them. I don't know that there was a verbal request by Trowbridge & Niver to return them. I told Speer verbally I couldn't give him credit for those notes. That was about the fifth of March. All the other matters I have talked about here in the last testimony, communications with Trowbridge & Niver, were by letter except this fifth of March talk.

(Motion to strike out testimony as to above communications.)

I never tried to raise money on those notes. [399]

Stipulation that affidavits and letter may be considered as evidence. (The clerk will here insert the stipulation and affidavits of Amos C. Miller, W. H. Rosecrans, Ralph G. Arnold, Samuel Storrow, and Frank Coy, and letter of W. S. Collins attached to said stipulation filed on the 23d day of July, 1912.)

Plaintiff's Exhibit 14. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 19. (The clerk will here insert

a true copy of said exhibit.)

Plaintiff's Exhibit 20. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 23. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 24. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 32. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 65. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 83. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 84. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 85. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 86. (The clerk will here insert a true copy of said exhibit.) [400]

Plaintiff's Exhibit 88. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 89. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 90. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 91. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 92. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 93. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 94. (The clerk will here insert

a true copy of said exhibit.)

Plaintiff's Exhibit 95. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 34. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 77. (The clerk will here insert a true copy of said exhibit.)

Plaintiff's Exhibit 80. (The clerk will here insert a true copy of said exhibit.)

Minutes of Big Lost River Irrigation Company. (The clerk will here insert a true copy of the minutes of the Big Lost River Irrigation Company introduced in evidence.)

This matter coming on for a settlement of the evidence to be included in the record on the appeal taken herein by the defendants, Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees, and the said appellants and Corey Bros. Construction Company and the Union Portland Cement Company, through their respective solicitors, [401] consenting thereto, it is ordered that the foregoing statement of the evidence be and it is hereby settled, allowed and approved as a true, complete and properly prepared statement of the evidence in said cause, and sufficient to properly present to the Circuit Court of Appeals the evidence pertinent to the issues raised on said appeal.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed March 27, 1913. [402]

Plaintiff's Exhibit No. 14.

**CONTRACT BY AND BETWEEN G. S. SPEER,
SUCCESSOR IN INTEREST TO THE BIG
LOST RIVER LAND AND IRRIGATION
COMPANY, LIMITED, AND THE STATE
OF IDAHO.**

THIS AGREEMENT, made and entered into in duplicate this 27th day of May, 1909, by and between the State of Idaho, the party of the first part, by and through the State Board of Land Commissioners of said state, said Board consisting of James H. Brady, Governor and Chairman, Robert Landon, Secretary of State, Daniel C. McDougall, Attorney General, and S. Belle Chamberlain, Superintendent of Public Instruction of said state, and George S. Speer, of the city of Chicago, county of Cook, State of Illinois, party of the second part.

WITNESSETH,

THAT, WHEREAS, the Big Lost River Land and Irrigation Company, Limited, a corporation, the predecessor in interest of the party of the second part herein, did heretofore, to wit: On February 19, 1906, file with the said State Board of Land Commissioners a proposal for the construction of certain irrigation works for the irrigation of lands in the Counties of Blaine, Bingham and Fremont in said State of Idaho, under the provisions of Section 4 of the Act of Congress approved August 18, 1894, commonly known as the Carey Act, and the acts [403] amendatory thereof and the laws enacted by the State of Idaho in pursuance of the power

granted by the said Acts of Congress, the lands being described as Idaho State Desert Land, List No. 8, comprising 79,122.06 acres, to which said proposal an amendment was filed with the said Board on July 13, 1906, and

WHEREAS, said Big Lost River Land and Irrigation Company, Limited, did thereafter, to wit: On November 15, 1907, file with the said Board a request and proposal for the segregation of new and additional lands, List No. 18, to the extent of 27,022.90 acres and the relinquishment of lands included in said First Proposal, List No. 8, to the extent of 27,194.15 acres which Second Request and Proposal was granted by said Board, together with a relinquishment of the lands, as proposed, the lands remaining after such relinquishment and such new and additional segregation being 78,950.81 acres, which segregations are still intact, and,

WHEREAS, at the request of the State of Idaho, the lands hereinbefore referred to, included in said List No. 18 and in said List No. 8 less the lands relinquished as aforesaid, have been, by agreements between the United States and the State of Idaho, set apart in compliance with the provisions of the said Acts of Congress, the said lands being fully described in Schedule "B" hereto attached and made a part of this agreement, and [404]

WHEREAS, on the 30th day of April, 1907, the State of Idaho, as party of the first part, did enter into a contract in writing with the said Big Lost River Land and Irrigation Company, Limited, for the construction of the works necessary for the

reclamation and irrigation of the lands included in said List No. 8, and

WHEREAS, no contract has yet been entered into for the construction of the necessary works for the irrigation of the lands included in said List No. 18, aggregating 27,000 acres and upwards, and

WHEREAS, it has been made to appear to the satisfaction of the Board that the said George S. Speer, party of the second part, herein, has become and now is the owner of all property, real and personal, rights, privileges and franchises of the said Big Lost River Land and Irrigation Company, Limited, including the property, rights, privileges and franchises relating to and connected with the irrigation system and works, the subject of agreement hereinbefore referred to of date April 30th, 1907, and

WHEREAS, said party of the second part, as such successor in interest, has made application to and filed with the Board a written proposal and request that the said agreement of April 30, 1907, be altered and amended for the reasons set forth in such written proposal, and [405]

WHEREAS, the said George S. Speer, party of the second part, has made a satisfactory showing as to the ability of himself and those whom he represents to construct the said irrigation works and to complete the same within the time allowed by law and by said agreement of April 30, 1907, and

WHEREAS, it appears that said Big Lost River Land and Irrigation Company, Limited, has entered into contracts to a large extent with settlers upon the lands to be reclaimed to supply said settlers with

water for their lands, and which contracts are still in force and unfulfilled on the part of said company, and it further appearing to the Board that it is to the interest of the State and to the settlers holding water contracts with said Big Lost River Land and Irrigation Company, Limited, the rights of which latter it is the purpose to secure by the terms of such altered and amended contract, that the request of said George S. Speer should be granted to the end that said works may be completed as originally proposed, and that the rights of the settlers upon the lands included in said project may be secured, and a resolution having been adopted by the Board to enter into said altered and amended contract as proposed.

NOW, THEREFORE, in consideration of the covenants and agreements herein contained, the party of the second part agrees to construct the dam, reservoir and irrigation system hereinafter referred to and described in accordance with [406] specifications hereto attached and marked Schedule "A" and hereby made a part of this contract, and to provide for the sale of shares of water rights in said reservoir and irrigation system, from time to time as and in the manner hereinafter provided, to persons applying to enter portions of the lands described in Schedule "B" hereto attached and hereby made a part of this contract, together with other lands which may hereafter be segregated upon the application of the party of the second part, his successors or assigns, and for which the said party of the second part is or may hereafter be author-

ized to furnish water; also to the extent of the capacity of the irrigation works to supply water from said irrigation system to the owners of other lands not described in said Schedule "B" but which are susceptible of irrigation from this system, such shares and water rights to be sold on the terms hereafter specified, and finally to provide the manner of transfer of ownership, management and control of said irrigation system to the purchases of said shares or water rights as hereinafter provided.

For a description of the dam, reservoir and irrigation system referred to, reference is made to Schedule "A" hereto attached and to the field notes of survey and contour maps on file in the office of the State Engineer at Boise, Idaho. [407]

2. GENERAL PROVISIONS.

It shall be the duty of the said second party to file with the State Engineer of the State of Idaho notes showing the size, courses and distances from angle to angle of the canals and main laterals as soon as the same shall have been finally determined and to, on demand, furnish any further detailed specifications that may be required. Changes may, from time to time, be made in the specifications by agreement between the State Engineer, State Land Board and the said second party, such changes, however, not to impair the efficiency or durability of the works for the purposes for which they are intended.

The main canals of this system shall have a carrying capacity when completed sufficient to deliver simultaneously one second foot of water for every eighty acres of land described in Schedule "B" at-

tached to this contract, together with all other land susceptible of irrigation from the said canals, for which water rights shall be sold by said second party, as nearly as the same can be estimated and agreed upon between the State Engineer and the engineers of the said second party.

Coulees and draws may be used as water ways when convenient, but all coulees or draws utilized as laterals from which water is to be taken by settlers for irrigation shall [408] be so constructed and improved as to practically conform to artificially constructed laterals of like capacity, so that water may be available for use from the same in practically the same manner and at approximately the same expense; and it is further agreed that the specifications as to the construction and improvement of said coulees and draws shall be filed from time to time as the work progresses with the State Engineer and the State Land Board for their approval, it being understood that this paragraph is to be liberally construed, in order that no unnecessary improvement of coulees need be made.

A main lateral, within the meaning of this contract, is a lateral taken from the main line of the canal. A subordinate lateral, within the meaning of this contract, is a lateral built for the purpose of conducting water from a main lateral to a point within half a mile of the place of intended use. A coulee or draw used as a main lateral or a subordinate lateral shall also be included within these terms.

The plans, specifications and details for the construction of the dam, reservoirs, canals, head-gates

weirs, etc., so far as the same are not covered by the specifications contained in Schedule "A" hereto attached, shall be submitted to the State Engineer of the State of Idaho for his approval prior to the further construction of any of said works, with the right of appeal by the said second party from his decision [409] to the State Board of Land Commissioners, and the works when completed shall be in accordance with the specifications as finally determined upon to the satisfaction of the State Engineer and the State Land Board.

The party of the second part reserves the right, by and with the consent of the first party, to construct any additional reservoirs, canals and dams, which, in his judgment, may hereafter become necessary; provided, such reservoirs, dams and canals shall meet with the approval of the first party and that they shall be constructed in a manner that shall meet with the approval of the State Engineer and with the State Land Board.

3. RIGHT OF WAY.

The said party of the first part grants to the said party of the second part a right of way across all lands belonging to the State of Idaho, or that may be ceded to the State of Idaho by virtue of the Act of Congress, commonly known as the Carey Act, or by any other laws for the construction and operation of said reservoir and irrigation system, which right of way shall be equal to the actual width of the canal, lateral or waste ditch at its base, from toe to toe of the embankment, together with a strip of land along one side of such canal, lateral or waste ditch, and

adjacent thereto, not to exceed fifty (50) feet in width along the main canal, thirty (30) feet [410] in width along the laterals leading from said main canal, and a proportionate width along the smaller laterals and waste ditches; said right of way to be located as designated by the Chief Engineer of the party of the second part, and approved by the State Engineer, and in all cases to be sufficient for ingress and egress along said canal, lateral or waste ditch, in proportion as the necessity therefor exists, and all water users on lands irrigated from said reservoir and irrigation system shall have such right of way as may be necessary from the second party's canal or laterals to their own land in order to construct and maintain the necessary service ditches for their own use, and such right of way across said lands as may be necessary for waste ditches. No reservoirs, however, shall be constructed under this provision of this contract upon any portion of Sections Sixteen (16) or Thirty-six (36), without making compensation and complying with the laws of the State governing that subject. No more laterals, service or waste ditches shall be constructed across any premises than are necessary, in the opinion of the Chief Engineer of the second party and the State Engineer, to properly irrigate the land so intended to be irrigated from such ditches and to carry away the waste water therefrom.

The laterals, service and waste ditches shall be constructed under the direction of the Chief Engineer of the [411] second party and subject to his approval and the approval of the State Engineer.

In case any land owner is dissatisfied with the location of any service ditch across his premises he shall have the right to appeal to the State Board of Land Commissioners, whose decision shall be final. Detail maps showing the location of laterals and waste ditches constructed by the second party shall be filed with the Board and with the State Engineer, but such filing need not be made prior to the lands being thrown open for settlement.

4. APPROPRIATION OF WATER.

It is understood that the party of the second part is the owner of permits to divert from Big Lost River and its tributaries, particularly Antelope Creek, 1300 cubic feet of water per second of time, under Permits Nos. 1507, 1513, 1748, and Permits amendatory thereof numbered 4061, 4062 and 4063 respectively, all of which permits were issued by the State Engineer of the State of Idaho, and appear of record in his office.

And the said party of the second part agrees to furnish and deliver to the owners of shares in said reservoir and irrigation system, as specified in the other provisions of this contract, all of said appropriated waters to which the said second party may be entitled, to the extent of one-eightieth (1-80) of one (1) cubic foot per [412] second of time per acre, said water to be furnished for the reclamation of the lands included in said Schedule "B," Segregation Lists Nos. 8 and 18 not heretofore relinquished, together with other lands which may be hereafter segregated at the request of the party of the second part, his successors or assigns, also any other lands

not included in said segregations, but which are so situated as to be susceptible of irrigation and reclamation from the canal and distributing system designed for the irrigation of the lands included in the aforesaid lists to the extent of the capacity of such irrigation works.

And the said second party hereby covenants and agrees that he has not done, suffered or permitted on his part any act or thing by reason whereof the appropriation so made, of the said waters of Big Lost River and Antelope Creek, for the purpose of the irrigation and reclamation of lands through the system of works to be constructed hereunder, has been or in the future may be in any way impeached, clouded or impaired.

5. ENTRY OF LANDS.

When the actual construction of the said canals and irrigation works shall have been so far completed as to insure that the said water will be furnished the lands described in Schedule "B" hereto attached the said Board of Land Commissioners may in their discretion cause to be opened to settlement, by advertisement as provided by law, such portions of said tract [413] as they deem advisable and which shall not have been already opened to settlement; in every case the opening of said lands to settlement and the disposition thereof to be under such regulations as shall be prescribed by the State Board of Land Commissioners.

6. APPLICATION FOR LANDS.

The said party of the first part, through its State Board of Land Commissioners, agrees that it will

not approve any application for or filing on the Lands referred to in Schedule "B" hereto attached, until the person or persons so applying shall furnish to the said Board a true copy of the contract entered into with the party of the second part for sufficient shares or water rights in said reservoir and irrigation system for the irrigation of said lands, said shares or water rights to be evidenced by the stock of the Lost River Water Company, as hereinafter provided.

The second party stipulates and agrees that to the extent of the capacity of the irrigation works and to the extent of his water rights, he will, as rapidly as lands are open for entry and settlement, sell, or contract to sell water rights or shares for land to be filed upon to qualified entrymen or purchasers without preference or partiality, other than that based upon priority of application; it being understood, however, that priority of application or priority [414] of entry or settlement shall not give any priority of right to the use of water flowing through the canal as against subsequent purchasers, but shall entitle the purchaser to a proportionate interest only therein, the water rights having been taken for the benefit of the entire tract of land to be irrigated from the system. The priority of the application upon the opening days shall be determined by a system of drawing under the direction of the State Board of Land Commissioners.

7. SALE OF LANDS BY THE STATE.

The party of the first part, acting through its State Board of Land Commissioners, agrees to sell

the lands described in Schedule "B" hereto attached, except in as far as already sold, to such persons as are or may be by law entitled to file upon the same, for the sum of fifty cents (\$0.50) per acre, half of which sum shall be paid at the time of application for the entry of such lands made to said Board, and the remaining one-half at the time of making final proof thereon.

8. PRICE OF WATER RIGHTS.

Said party of the second part further agrees and undertakes that he will sell or cause to be sold to the person or persons filing upon any of the lands described in Schedule "B" hereto attached, together with lands which may hereafter be segregated, as well as to the owner of other lands not described [415] herein, but which are or may be susceptible of irrigation from his canal system, by good and sufficient contract of sale with right of possession and enjoyment by the purchaser pending its fulfillment, a water right or share in said irrigation works for each and every acre filed upon or purchased from the State or acquired from the United States. Each of said shares or water rights shall represent a carrying capacity in said canal sufficient to deliver water at the rate of one-eightieth (1-80) of one (1) cubic foot per acre per second of time, and each share or water right sold or contracted, as herein provided, shall also represent a proportionate interest in said reservoir and irrigation works, together with all rights and franchises therein, based upon the number of shares finally sold in said reservoir and irrigation works. Said irrigation system, however, to be built

in accordance with the plans and specifications hereto attached as Schedule "A" and filed with the Board, which irrigation system, according to said plans, has been determined by the State Engineer to have the carrying capacity hereinbefore mentioned.

Such water rights or shares shall be sold to the person or persons aforesaid for lands included in said segregations and for lands adjacent thereto, at a price not exceeding forty (\$40) Dollars per share, except as is hereinafter provided, the same to be paid for as follows: [416]

In cash at the time of sale, four dollars per acre. And the remainder in nine annual installments, bearing interest at the rate of six per cent (6%) per annum, interest payable annually, installments as follows:

One year from date of sale,	\$4.00
Two years Do.	4.00
Three Do.	4.00
Four Do.	4.00
Five Do.	4.00
Six Do.	4.00
Seven Do.	4.00
Eight Do.	4.00
Nine Do.	4.00

Total Forty (\$40) Dollars per acre.

To the person or persons purchasing any portion or portions of Sections numbered sixteen (16) or thirty-six (36), or any other land belonging to the State of Idaho and within the exterior limits of said segregations and which are susceptible of irrigation and reclamation from said irrigation system, water

rights or shares shall be sold at a price not to exceed Thirty (\$30) Dollars per share; provided, said water rights or shares are purchased within one year after the purchase of the lands from the State, and not exceeding Forty (\$40) Dollars per share at any time thereafter. Said payments upon said state lands to be made as follows:

When the price is Thirty (\$30) Dollars per acre.

In cash at the time of sale, Three (\$3) Dollars per acre. And the remainder in nine annual [417] installments, bearing interest at the rate of six per cent (6%) per annum, interest payable annually, installments as follows:

One year from date of sale		\$3.00
Two years	Do.	3.00
Three	Do.	3.00
Four	Do.	3.00
Five	Do.	3.00
Six	Do.	3.00
Seven	Do.	3.00
Eight	Do.	3.00
Nine	Do.	3.00

In case purchaser or entrymen on lands other than those segregated under the Carey Act decline to purchase water rights for two years or more after the water is ready for delivery, then \$2.40, may be added to the price of the water right for each year's delay, or fraction thereof,

It is further agreed that no payment other than the initial payment and no interest shall be required under any contract either for Carey Act Lands or State or private lands until the water for the said

land is available from said reservoirs and canals for distribution at a point within one-half mile of each legal subdivision of 160 acres of the said lands, and such water must be available May first in order to make such payments become due, and all payments and interest provided in said contract shall be advanced in time according to the delay in the delivery of said water as aforesaid.

It is understood and agreed that the said party of the second part shall charge interest at the rate of six per cent [418] per annum, upon all deferred payments whenever said shares are sold upon a time contract. This agreement shall not, however, be construed to prevent the sale of shares or water rights to purchasers upon terms more favorable than those hereinbefore provided, or to prevent the payment of installments of the purchase price in advance of the maturity of the same at the option of the purchaser. But in no case shall water rights or shares be dedicated to any of the lands aforementioned or sold beyond the carrying capacity of the said canal system or in excess of the appropriation of water as hereinbefore mentioned.

9. TRANSFER OF POSSESSION AND MANAGEMENT OF CANAL.

It being necessary to provide a convenient method of transferring the ownership and control of said canal and irrigation works from the said party of the second part herein to the purchasers of said water rights in said canal and for determining their rights among themselves and between said purchasers and the party of the second part herein,

for the purpose of operating and maintaining said canal during the period of construction and afterwards and for the purpose of levying and collecting tolls, charges and assessments for the carrying on and maintaining of said canal and the management and operation thereof, it is hereby provided that, as soon as practicable after the execution of this contract, a corporation, to be known as the Lost River Water Company, [419] shall be formed at the expense of the party of the second part, the Articles of Incorporation of said company to be in the form approved by the Attorney General of the State of Idaho, a copy of which approved Articles is hereto attached, marked Schedule "E" and made a part hereof; that the authorized capital stock of said corporation shall be one hundred thousand dollars, divided into 100,000 shares of a par value of \$1.00 each, which amount is intended to represent one share for each acre of land which may hereafter be irrigated from said canal and irrigation system. The entire authorized amount of the capital stock of said corporation shall be delivered to the party of the second part herein in consideration of the covenants and agreements herein contained in order to enable it to deliver to purchasers of water rights the shares of stock evidenced and accompanying the same. Said shares of stock, however, shall have no voting power and shall not have force and effect until they have been sold or contracted to be sold to purchasers of land under this irrigation system.

At the time of the purchase of any water right there shall be issued to the purchaser thereof one

share of the capital stock of said corporation for each acre of land entered or filed upon. That the said party of the second part herein shall, in case said water rights are not fully paid for, require the endorsement and delivery to it of [420] said stock, and shall at the same time, require of said purchaser an agreement that until thirty-five (35%) per cent of the purchase price of said stock has been paid the said party of the second part herein shall vote said stock in such manner as it may deem proper at all meetings of the stockholders of said corporation.

But the said second party hereto nor the Lost River Water Company, Limited, cannot in any manner control any of the said system so as to limit the liability of the second party under the terms of this contract.

The said Lost River Water Company shall have the management, ownership and control, as above set out, of the said irrigation system as fast as the same is completed and turned over to it for operation by the said party of the second part, as hereinafter provided. Whenever it is certified by the Chief Engineer of the party of the second part and the State Engineer that certain portions of said irrigation system are completed for the purposes of operation, the same shall, with the consent of the State Land Board, be turned over to the said Lost River Water Company for operation, and said last named company shall thereupon take possession of and operate the same. Such transfer and operation, however, shall not in any manner lessen the responsibility of the said second party with reference to the terms of this

contract, nor shall such consent upon the part of the State [421] Land Board be construed as a final acceptance of such portion of such canal, it being always understood that the acceptance of said irrigation system must be in its entirety and that the bond given for the faithful performance of the said contract must be made and be liable for the substantial completion of the entire irrigation system.

10. WATER RIGHT DEDICATED.

The certificate of shares of stock of the Lost River Water Company shall be made to indicate and define the interest thereby evidenced in the said system, to wit: A water right of one-eightieth (1-80) of a cubic foot per second for each acre and a proportionate interest in said reservoir and irrigation system, based upon the number of shares ultimately sold therein. While the party of the second part shall retain control of said Lost River Water Company, water, when measured, shall be measured and shall be available for use within one-half mile of the place of intended use and in such quantities and at such times as the condition of the crops and weather may determine, but according to such rules and regulations, based upon a system of distribution of water to the irrigators in turn and by rotation, as will best protect and serve the interests of all the users of water from said irrigation system. It is agreed that said system of distribution by rotation shall be devised by the said party of the second part and used by the said Lost River Water Company (in case [422] the necessity arises) during the period while he retains the management of said Lost River

Water Company, said system of rotation, however, to be approved by the State Engineer. The sale of the water rights to the purchaser shall be a dedication of the water to the lands to which the same is to be applied, such water right to be a part of and to relate to the water right belonging to said irrigation system.

11. MEASUREMENT OF WATER AND CHARGES FOR DELIVERY.

The party of the second part agrees to construct said reservoir and irrigation system so that water conducted through its canals may be available at points not to exceed one-half mile, measured in a direct line, from each quarter section of land described in said segregations, and to be irrigated and reclaimed by water conducted through said canals. That he will construct and place in position all headgates, flumes, weirs and other devices for the control and measurement of water in the main canals and reservoirs and in the main laterals, it being intended that the settler shall, under the direction of the Chief Engineer of the second party, build and furnish one gate or measuring device for his use, but that all other gates, weirs and measuring devices in the main canals, main or subordinate laterals shall be furnished and constructed by the second party. Plans for measuring devices, headgates and weirs are to be approved [423] by the State Engineer. No charge shall be made to the purchaser for the delivery of water for said lands, or lands adjacent thereto, prior to the first day of May, 1910. For each succeeding year thereafter, while the second party

retains the control of the said Lost River Water Company, said Company may charge and assess the purchasers of water rights in said irrigation system not to exceed the sum of fifty cents (50¢) per acre for each acre of land for which a water right has been purchased, the same to become due May first of each year, if the water is ready for delivery at the beginning of such season, and such water must be available for use at a point within one-half mile of each quarter section of such land. If the sum so raised shall be insufficient for the purpose of maintaining, operating and keeping in repair the said system and paying the expenses for the management thereof, then the said party of the second part will furnish all the additional funds necessary to supply such deficiency.

During each year, while the second party retains the control of the said Lost River Water Company, the said company shall furnish a supply of water for domestic use and for the watering of stock, when necessary, outside of the regular irrigating season; such water to be delivered under rules and regulations to be prescribed by said company. [424]

12. COMPLETION OF SYSTEM.

Said party of the second part agrees to continue to prosecute the work of said reservoir and irrigation system diligently and continuously to completion; and that there shall be no cessation of work thereon for more than sixty days without the consent of the Board; and to supply water to the unrelinquished lands included in the said Lists Nos. 8 and 18 on or before May 1, 1911, and to complete the

entire irrigation works, on or before April 30, 1912, at which last mentioned date the obligation to furnish the full one-eightieth (1-80) of a cubic foot per second of time of water per acre shall be in force and effect.

It is understood that charges and alterations in the plans and specifications heretofore prepared and filed may be made at any time with the consent of the State Board of Land Commissioners.

13. FORFEITURE.

The rights of the party of the second part herein, or his assigns, may be forfeited in accordance with the laws of the State of Idaho now in force and effect.

14. ESTIMATED COST.

The estimated cost of the proposed irrigation works is three million five hundred thousand (\$3,500,000) Dollars and upwards, and the price at which water rights are fixed [425] herein and for which liens are authorized by law against separate legal subdivisions of land herein described are deemed necessary in order to pay the costs and expenses of reclamation and interest thereon. The existing laws under which this contract is made are understood and agreed to be a part of this contract.

15. DESCRIPTION OF LANDS.

The lands hereinbefore referred to are lands donated by the Act of Congress of the State of Idaho under and pursuant to the Act approved August 18, 1894, and the amendments relating thereto, commonly called the Carey Act, the irrigation and reclamation of which lands this contract is designed to effect. The lands are fully set forth in Schedule

B hereto attached and which are hereby referred to and made a part hereof.

16. HIGHWAYS.

Entries of land are understood to be made subject to a right of way, without compensation to the entrymen, for roads upon all exterior section lines and also upon all half section lines, which may be designated by the Board of County Commissioners, as may be provided by law. [426]

17. WATER SUPPLY FOR CITIES AND TOWNS.

It is understood and agreed that so much water as may be necessary for the use of cities and towns and the inhabitants thereof, which cities and towns must necessarily take their water supply from said system of canals, shall be furnished from said canal system to said cities and towns and the inhabitants thereof, upon such terms of sale or rental as may be agreed upon by the party of the second part and said cities and towns or the owners of the lands upon which the same are established, or the residents therein. Said cities and towns must contribute to the maintenance and support of said irrigation system in proportion to the amount of water used by them, and shares of stock of the Lost River Water Company shall be issued for the amounts of water represented by said use to the Trustees of any village or the Mayor of any City, in trust for the use and benefit of the towns and cities and the inhabitants thereof.

18. DELIVERY OF WATER TO USERS.

It is agreed that the said Lost River Water Com-

pany shall not deliver water to or permit the use thereof from said irrigation system by persons who have not purchased water rights or who are not holders of stock in said Lost River Water Company, or who are not otherwise entitled thereto, under this contract. [427]

19. ASSIGNMENT OF INTEREST — MORTGAGE.

The right, title and interest of the second party in the works and irrigation system, and in this contract, may be sold or assigned, and the interest of said second party, or his assigns, may be mortgaged, the form of such mortgage to be approved by the Attorney General of Idaho.

20. QUITCLAIM BY SECOND PARTY.

When full payment shall have been made to the party of the second part, his successors or assigns, for each and every of the Water Rights sold, said party of the second part, his successors or assigns, shall quitclaim to said Lost River Water Company all his, or their, right, title, claim or interest in and to the said irrigation system and appurtenances, including lands, water rights, reservoir or reservoirs, dams, main and lateral canals, ditches, head-gates, and any and all rights, privileges and franchises pertaining thereto or connected therewith, free from any and all liens or encumbrances created by said party of the second part, or his successors or assigns.

21. NEW CONTRACTS IN EXCHANGE.

Said party of the second part hereby assumes and undertakes the fulfillment of each and every of the

contracts, both time and cash, for water rights heretofore sold and contracted to be furnished by the Big Lost River [428] Land and Irrigation Company, Limited, with the several persons, or the assigns of such persons, mentioned and set forth in the Schedule hereunto attached and marked Schedule "C" and made a part of this agreement, and it is agreed, that, upon the execution of the said party of the second part or his assigns, of contracts in the form heretofore approved by said Board and which are hereunto annexed, made a part of this agreement and marked Schedule "D," the said several parties holding time water contracts with said Big Lost River Land and Irrigation Company, as per Schedule "C," shall surrender said contracts so held and receive in lieu thereof a new contract as herein provided. The price for shares and water rights in such new contract to be the same as is provided in the contract surrendered and the holder of a time contract as per said Schedule "C" shall, at the time of executing such new contract, receive credit for the payment heretofore made on such former contract and the remaining payments shall correspond in amount to those provided for in such former contract.

Owners of cash contracts, as per Schedule "C," shall, as soon as water shall be ready for delivery to and use upon said lands, and upon the surrender and cancellation of the contracts now held by them, respectively, receive full paid shares of the capital stock of the Lost River Water Company to the number as heretofore purchased of said Big Lost River [429] Land and Irrigation Company, Limited, and

paid for in full to said company; the water represented by said shares to be and remain dedicated and attached to the particular tract of land described in such cash contracts and certificates of shares.

22. AMENDMENTS.

This contract may be altered and amended by first party with the consent of second party for the purpose of carrying out the object of the contract, and for the purpose of meeting any conditions now unforeseen.

23. BOND.

The said second party agrees to furnish a good and sufficient bond according to law for the faithful performance of the within contract.

IN WITNESS WHEREOF, the said party of the first part, the State of Idaho, has caused the agreement to be signed in duplicate by its Governor and President of the State Board of Land Commissioners of the State of Idaho, and the seal of said Board to be affixed, and attested by the Register, and the party of the second part has hereunto set his hand and seal the day and year first above written.

For the STATE OF IDAHO.

[Seal] By JAMES H. BRADY,
Governor and President of State Board of Land
Commissioners.

Attest: M. I. CHURCH,
Register.

GEORGE S. SPEER. [Seal] [430]

Filed April 25, 1912. A. L. Richardson, Clerk.

Schedules B, C, D and E omitted at request of attorney for appellant. [431]

Plaintiff's Exhibit No. 19.

THE ARNOLD COMPANY.
Engineers—Constructors.
Electrical—Civil—Mechanical.
181 La Salle Street.
Chicago.

COPY.
CERTIFICATE FOR PAYMENT
ON CONTRACT FOR
MACKAY RESERVOIR DAM.

Certificate No. 23.
Date July 31, 1910.

To Big Lost River Irrigation Company
Boise, Idaho.

Date of Commencement June 1, 1909.
Date of Completion.

This is to certify that there is now due Corey Bros. Construction Company, Contractor, the sum of Eleven Thousand seven hundred twenty-five and 78/100 Dollars as 23rd payment on account, for material delivered and labor performed on site to and including _____ under contract dated _____ as follows:

Item No.	Description.	Preliminary Estimate of Quantity.	Preliminary Estimate of Cost.	Unit Price.	Estimate of Quantity Done to Date.	Cost of Work Done to Date.	Per Cent Remaining to be Done.
1	Force Account & Extra to July 1, " "			Cost+10%		\$ 17,016.25	
2	" " " "			" "		114.40	
3	Tunnel Excavation	40,000	\$ 16,000.	0.50	24,162.0	12,081.00	00
4	" " " "			1.50	2,304.0	3,456.00	00
5	Cut-off trench			0.25	1,544.0	386.00	00
6	Core Wall			0.25	390.0	97.50	00
7	Tunnel			5.00	2487.5	12,437.50	00
8	Embankment earth	956,914	240,000.	.25	47,908.0	119,977.00	50.7%
9	" " " "			.50	9,000.0	4,500.00	
10	Concrete Core Wall			12.00	2,080.2	24,962.40	
11	Spillway Excavation			1.50	5,855.0	8,782.50	31.3%
12	Concrete Tunnel & Around Outlet Pipes			12.00	1,755.2	21,062.40	15%
13	Concrete on face of dam			12.50	763.8	9,547.50	00%
14	Cofferdam			.25	18,537.0	4,634.25	86%
15	Spillway Tunnel			5.00	554.3	2,771.50	

Correct: GOYNE DRUMMOND,

Resident Engineer.

Approved: W. H. ROSECRANS,

Chief Engineer.

Audited: W. G. FARNSWORTH,

Auditor.

Total Cost of Work to Date.....\$241,826.20
Less 10% Per Cent Retained 24,182.62
Total Amount Due Contractor to Date..... 217,643.58
Less Previous Certificates..... 205,917.80
Amount Due Contractor this Certificate..... 11,725.78

Plaintiff's Exhibit No. 20.

COPY.

THE ARNOLD COMPANY.
Engineers—Constructors.
Electrical—Civil—Mechanical.
181 La Salle Street.
Chicago.

CERTIFICATE FOR PAYMENT
ON CONTRACT FOR
CANAL SYSTEM

BIG LOST RIVER IRRIGATION PROJECT.

Certificate No. 23.

Date August 31, 1910.

To Big Lost River Irrigation Company,
Boise, Idaho.

This is to certify that there is now due Corey Brothers Construction Company, Contractor, the sum of Three Thousand Two Hundred Fifty One and 61/100 Dollars as 23rd payment on account, for material delivered and labor performed on site to and including ———, under contract dated ———, as follows:

Item No.	Description.	Preliminary Estimate of Quantity.	Preliminary Estimate of Cost.	Unit Price.	Estimate of Quantity Done to Date.	Cost of Work Done to Date.	Per Cent Remaining to be Done.
1	Force account to July 31, 1910.....			Cost + 10%		\$ 38,490.47	
2	Force account August, 1910.....					0.00	
3	Earth excavation			0.16	1,306,592.1	209,054.73	
4	Gravel excavation			0.25	542,531.2	135,632.80	
5	Loose rock excavation			0.50	147,940.3	73,970.15	
6	Solid rock excavation.....			1.50	239,414.9	359,122.35	
7	Clearing			6.00A.	945.49	5,672.94	
8	Concrete			12.00	3,282.09	39,385.08	
9	Reinforced concrete			12.50	3,445.49	43,068.63	
10	Riprap hand laid.....			1.00	11,192.13	11,192.13	
11	Bridging			40.00M.	227,031.20	9,081.25	
12	Tunnel			6.00	1,146.80	6,880.80	
13	Riprap, not hand laid			1.00	476.2	476.20	

Total Cost of Work to Date.....\$932,027.53
Less 10% Per Cent Retained..... 93,202.75
Total Amount Due Contractor to Date..... 838,824.78
Less Previous Certificates..... 835,573.17
Amount Due Contractor This Certificate..... 3,251.61

Correct: GOYNE DRUMMOND,

Resident Engineer.

Approved: F. A. SAGER,

Chief Engineer.

Audited: W. G. FARNSWORTH,

Auditor.

Filed Apr. 25-1912. A. L. Richardson, Clerk. [433]

Plaintiff's Exhibit No. 23.

THIS AGREEMENT, Made and entered into this 26th day of August, 1909, by and between COREY BROTHERS CONSTRUCTION COMPANY, hereinafter called the Contractor, having its principal place of business in the city of Ogden, State of Utah; and the BIG LOST RIVER IRRIGATION COMPANY, hereinafter called the Company, having its principal place of business in the City of Boise, State of Idaho,

WITNESSETH:

THAT, WHEREAS, The Contractor has agreed to furnish all labor and appliances required, and to construct an earthen dam, diversion works, tunnels, canals, concrete structures, and all other work incidental to the completion, ready for operation, of the irrigation system of the Company all in accordance with plans and specifications prepared by the Engineer for said Company:

NOW, THEREFORE, In consideration of the covenants herein contained, the parties hereto agree each with the other, as follows:

1. *Definition of Terms:*

Wherever the term Contractor is used in this Contract, it refers to and indicates Corey Brothers Construction Company.

Wherever the term Company is used in this Contract, it refers to the Big Lost River Irrigation Company.

The term Engineer is used to designate the Consulting Engineer duly appointed and assigned by the

Company to have general charge of all work incidental to the construction of the Company's project ready for operation.

2. *General:*

The Contractor hereby covenants and agrees to provide all labor and all materials, not herein required to be furnished by the Company, necessary for the complete and substantial execution of everything described or reasonably implied in the following specifications, in strict accordance in all respects with the terms of this contract, and to the satisfaction and acceptance of the Engineer, including all transportation, apparatus and appliances of every kind requisite for the same.

The Contractor further covenants and agrees that the plans accompanying these specifications and referred to in these specifications are to be and are accepted as an essential part of this contract, the same as if written at length herein, it being distinctly understood that wherever the specification conflict with this agreement, the terms of this agreement shall govern. [434]

The several parts of this contract shall be taken together to explain each other, and to make the whole consistent. All work that may be called for in the specifications and not drawn on plans, or drawn on plans and not called for in the specifications, is to be executed and furnished as if described in both these ways; and should any work or material which is not noted in the specifications and plans, but which is nevertheless necessary for the proper carrying out of the obvious intentions thereof and of

this contract, the same shall be deemed to be implied and required, and not to be an addition to or deviation from the work hereby contracted for, and the Contractor shall, without additional remuneration, perform all such work and furnish all such material as fully as if it were particularly delineated or described.

3. *Subletting or Transferring of Contract:*

The Contractor shall not sublet nor transfer this contract, or any part thereof, to any person, excepting for the delivery of material, without the consent and approval in writing of the Engineer, who shall be furnished with copies of contracts if he requires them. The Contractor shall give competent attention to the work, and shall also keep a thoroughly competent foreman constantly upon the work. No subcontract shall under any circumstances relieve the Contractor of his liability under this contract, should the subcontractor fail to perform the work undertaken by him.

4. *Co-operation:*

The Contractor shall co-operate with any other contractors that work on the premises, and arrange to carry on his work in such a manner that none of the other said contractors shall be unnecessarily hindered or delayed in the progress of their work.

5. *Inspection:*

The Supervising Engineer, or his duly authorized assistants, shall at all time have access to the work, which work is to be entirely under their control.

Any material or construction which does not fully accord with the letter or the intent of these specifica-

tions may be condemned by the Engineer or his representatives, and the Contractor shall immediately rectify or replace such defective work without expense to the company.

6. *Night and Day Work:*

If so directed by the Engineer, the Contractor shall carry on the work day and night, in order to complete the same within the contract time, and no extra charge shall be made by the Contractor for such night work.

7. *Time of Completion:*

It is hereby expressly covenanted and agreed by the [435] Contractor that all work pertaining to this contract shall be started within ten (10) days from the execution hereof, and carried forward to completion as rapidly as is consistent with the weather and other conditions, and completed before May 1st, 1910; provided that, if the contractor is prevented from beginning or proceeding with said work at any time by reason of strikes, inevitable accident or casualty, the act of God, or for any cause over which the Contractor has no control, the time the Contractor shall be necessarily delayed by any of said causes shall be added to the time herein provided for the completion of said work.

8. *Guaranties:*

The Contractor agrees to defend any and all suits for alleged infringement of any process of construction or system furnished by him under the specifications, and further agrees to reimburse the Company for any and all expense resulting from litigation with reference thereto; provided, however, that noth-

ing in this paragraph contained shall require the Contractor to defend or to reimburse the Company for defending any suit resulting from or growing out of the use of any device specifically described in the specifications and required to be used or incorporated by the Contractor in said dam or other structure.

The Contractor further guarantees all workmanship and all material furnished by him to be first class in every particular, and agrees to replace free of cost to the Company any part or piece showing defects of such material or workmanship within a period of one year from the completion of the entire work, unless otherwise specified. The Contractor further agrees not to use any material, whether furnished by him or otherwise, known to him to be inferior or defective.

9. *Bond:*

The Contractor agrees upon the execution and *deliver* of this contract, if the Company so directs, to execute and deliver to the Company a good and sufficient bond of indemnity in amount equal to.....

.....
and as security for the faithful performance by him of all the covenants and agreements he undertakes in this contract. The security in such bond of indemnity shall be a properly recognized surety corporation, and such security shall be such as shall be accepted and approved by the Engineer. It is understood that the cost of such bond, if required by the Company, shall be paid by the Big Lost River Irrigation Company.

10. *Compensation:*

In consideration of the faithful performance by the Contractor of all and singular the covenants and agreements herein contained, the Company agrees to pay the Contractor the following prices for doing the work, to-wit: [436]

Earth and Gravel, to construct

dam..	\$0.25 per cubic yard.
Tunnel Excavation at Dam... .	5.00 per cubic yard.
Tunnel excavation in Canal.. .	6.00 per cubic yard.
Riprap per square yard (not hand laid)	1.00
Concrete of all kinds and structures	12.00 per cubic yard.
Driving Piling, cost plus 10%	
Solid Rock excavation.....	1.50 per cubic yard.
Loose rock excavation.....	.50 per cubic yard.
Earth excavation in canal... .	.16 per cubic yard.
Clearing sage brush.....	6.00 per acre.
Lumber, in place.....	40.00 per thousand.
Wet excavation below river level, cost plus 10%.	
Wash Gravel, or 90% pure gravel . . . . .	.25 per cubic yard.
Pumping of all kinds, cost plus 10%.	
Any extra work ordered by Engineer, cost plus 10%.	
Riprap, hand laid.....	1.00 per sq. yard. plus 110% cost of laying.

All material furnished by Contractor, except lumber, cost of haul plus 10% cost of material.

The same classification of materials shall hold as stated in specifications for Mackay Dam.

On canal construction, the length of free haul shall be 200 feet, measured from center of gravity of embankment to center of gravity of excavation. An allowance of $11\frac{1}{2}$ cts. per cu. yd. per 100 ft. over haul shall be made.

For hauling cement from the nearest railroad station to the dam site, the contractor shall be allowed \$1.50 per ton; but all cement for canals shall be hauled by the contractor free.

Partial payments of ninety per cent. (90%) of the cost of the materials furnished and work done (said payments to be based upon the contract prices covering the entire work) shall be made by the Company to the Contractor on or before the tenth day of each calendar month for all work done by the Contractor during the preceding calendar month; but said partial payment shall be made only on estimates by the Engineer of the amount of work done and material furnished and of the proper allowance hereunder for such work and material. Final payment of the balance of the contract prices shall be made by the Company to the Contractor within sixty (60) days of the completion of the work and acceptance thereof by the Engineer, provided that first payment shall not become due until.....

11. *Materials for Construction:*

The following construction materials will be furnished by the Company.

All cement will be furnished f. o. b. cars at the nearest railroad station. The Contractor's price per

cubic yard for placing concrete shall cover the unloading [437] and storing of cement in a dry place until used, and shall include the proper care of and shipping back to the cement mill of all sacks, the freight charges, however, being paid by the Company. Any loss of cement due to improper storage or carelessness on the part of the Contractor will be charged against the Contractor.

All steel reinforcement will be furnished F. O. B. cars at the nearest railroad station, and the price paid the contractor per pound for placing steel reinforcement will include the unloading from the cars and responsibility for the material until placed in the work.

All sheet piling, valves and structural steel, hereafter specified to be furnished the Contractor on items which are to be placed by force account will be furnished f. o. b. cars at the nearest railroad station, and the force account paid the Contractor for placing sheel piling shall include the unloading from the cars and responsibility for the material until placed in the work.

It shall be the duty of the Contractor to make requisition for materials furnished by the Company at such a date that the same can be furnished without delay to the work, and the Contractor shall hold the Company harmless from demurrage charges due to delay in unloading materials.

12. *Understanding of Plans and Specifications:*

The Contractor hereby distinctly and expressly declares and acknowledges, that before the signing of this contract, he has carefully read the same and the

whole thereof, together with and in connection with the set of plans and specifications herein referred to, and that he has made such examination of this contract and of such plans and specifications and such investigation of the work required to be done and of the material required to be furnished as to enable him to thoroughly understand the intention of this contract and the requirements, covenants, agreements, stipulations and restrictions contained in this contract and in said plans and specifications, and distinctly agrees that he will not hereafter make any claim or demand upon the Company based upon or arising out of any alleged misunderstanding or misconception on his part of the said requirements, covenants, stipulations and restrictions.

13. *Other Agreements:*

It is understood that there are no written or verbal agreements outside of this contract.

IN WITNESS WHEREOF, the parties hereto have executed this instrument in duplicate the day and year first above written.

COREY BROTHERS CONSTRUCTION
COMPANY,

By W. W. COREY, President.

(Seal) Attest: R. D. ROBERTS,

Secretary.

BIG LOST RIVER IRRIGATION COM-
PANY,

By G. B. HURTT, President.

(Seal) Attest: B. W. OPPENHEIM,

Secretary. [438]

SPECIFICATIONS
FOR
THE CONSTRUCTION OF
EARTH DAM AND CONTROLLING WORKS
AT
MACKAY RESERVOIR SITE
MACKAY, IDAHO.

THE ARNOLD COMPANY
Engineers—Constructors
Electrical—Civil—Mechanical
181 La Salle Street
CHICAGO
May, 1909.

INDEX TO SPECIFICATIONS FOR THE CONSTRUCTION OF EARTH DAM AND CONTROLLING WORKS AT MACKAY RESERVOIR SITE.

I. General:		Page.
1. Scope of Specifications.....	“	1
2. Drawings.....	“	1
3. Inspection.....	“	2
4. Transportation... ..	“	2
5. Completion of Work.. ..	“	2
6. Changes in Plans.....	“	2
7. Proposals... ..	“	2
II. SCHEDULE AND CLASS:		
1. GENERAL... ..	“	3
2. Schedule... ..	“	3
3. Classification for Payment.....	“	4
4. Classification of Excavation.....	“	4
Earth.....	“	4
Gravel.....	“	5
Loose Rock.....	“	5
Rock... ..	“	5
Tunnel Excavation.. ..	“	5
Forming Embankment... ..	“	5
5. Monthly Estimates & Payments.....	“	5
6. Materials for Construction.....	“	5
III. MATERIALS AND WORK- MANSHIP.		
1. General.....	“	6
2. Cement.....	“	6
3. Gravel.	“	7
4. Crushed Stone.....	“	7

5. Sand.....	Page 8
6. Concrete.....	“ 8
7. Timber.....	“ 9
8. Steel & Iron.....	“ 9

IV. DETAILS OF CONSTRUCTION:

1. GENERAL.....	“ 10
2. Sequence of Construction.....	“ 11
3. Preparation of Foundation.....	“ 11
4. Driving Sheet Piling.....	“ 12
5. Cut-off Trenches & Core Wall Trenches	“ 12
6. Back-filling of Cut-off Trenches.....	“ 12
7. Concrete Core Wall.....	“ 13
8. Forming Embankment.....	“ 13

[440]

INDEX #2.

	Page.
9. Riprap.....	“ 14
10. Spillway.....	“ 15
11. The Outlet Tunnel.....	“ 15
12. Tunnel Excavation.....	“ 15
13. Concrete Tunnel Lining.....	“ 16
14. Placing Valves, Castings & Structural Steel.....	“ 16
15. Concrete Structures.....	“ 16
16. Back-filling behind Structures.....	“ 17
17. Grading & Cleaning up of Site.....	“ 17
V. PROPOSAL SHEET.....	“ 18

[441]

SPECIFICATIONS
FOR THE CONSTRUCTION OF
EARTH DAM AND CONTROLLING WORKS
AT MACKAY RESERVOIR SITE.

I. GENERAL.

1. *Scope of Specifications:*

It is the intention of these specifications to provide all labor, tools and materials required both for the furnishing and construction as herein specified of the Mackay Reservoir Embankment and Controlling Works, to be located about 2½ miles north-west of Mackay, Idaho, in Section 12, Township 7 North, Range 23 East, the same being a part of the irrigation project of the Big Lost River Land & Irrigation Company.

The work is hereinafter described under the headings appearing in the index on the preceding page.

2. *Drawings:*

The following detailed plans covering the work herein specified will be furnished, and are hereby made a part of these specifications.

145005-A1 Contour map of reservoir site showing dam location.

145202-B3 Plan and cross sections of dam.

145202-B4 Plan, profile and cross section of spillway.

145202-D3 Details of tunnel and controlling works.

Construction details are shown on the drawings accompanying these specifications, but if the Contractor discovers that drawings of the work will not provide a satisfactory construction, it is his duty to immediately stop the work in question, and notify

the Engineer in writing. He shall not proceed with the construction until satisfactory construction has been decided on, and until he has been notified in writing by the Engineer for the Big Lost River Land and Irrigation Company to proceed with the work.

3. *Inspection:*

The material and work called for under these specifications shall be subject to the inspection of the Engineer of the Big Lost River Land and Irrigation Company. The contractor shall give every facility at all times to make standard tests, inspection of materials and work, and all orders of the Engineer [442] as to the fitness of material or work shall be obeyed by the successful bidder under these specifications.

All material that has been rejected by the Engineer on the work is to be removed at once from the site of the work. Any work that has been done, and has been found to be defective, shall at the direction of the Engineer be taken out and replaced to the satisfaction of the Engineer.

4. *Transportation:*

The Oregon Short Line Railroad passes through Mackay, Idaho, located about 2½ miles from the dam site.

5. *Completion of Work:*

Work hereinafter specified shall be started immediately on letting contracts, and shall be entirely completed.

6. *Changes in Plans:*

No change from the designs as shown on the plans shall be allowed in the construction of any part of the

work without written authority from the Engineer. In case unforeseen difficulties in the construction work necessitate such changes, they will be authorized by the Engineer in writing, and the Contractor shall then construct the work in accordance with the revised plans, and shall be paid for the same at the contract rates. In case any such changes necessitate an entirely different method of construction work, unit prices for the revised method of construction shall be agreed upon in writing before construction shall proceed on this part of the work.

7. *Proposals:*

Bidder shall submit a proposal on all the work herein specified, setting forth the unit prices for which the bidder will contract to do the required work in accordance with these specifications.

Proposal will be submitted on the attached proposal sheet. The blanks on proposal sheet shall be filled out, including the date on which, and price for which, the construction herein specified shall be completed.

II. SCHEDULE AND CLASS.

1. *GENERAL:*

The dam and controlling works herein specified are part of the irrigation system to be constructed by the Big Lost River Land and Irrigation Company, under which project it is proposed to store the flow of the Big Lost River in [443] Mackay Reservoir, and to release this storage to the river bed as required in irrigation seasons. The flow is to be diverted into the canal system at a lower point.

The work consists of an earth dam about 2,050 ft.

long, containing approximately 925,000 cu. yd. of embankment, together with cut-off trenches, concrete core walls, sheet piling and riprapping upstream face of dam, a spillway about 350 ft. long excavated in solid rock, and a discharge tunnel excavated in rock for a length of about 400 ft. with the necessary controlling works and approaches.

2. *Schedule:*

The work herein specified will include the following:

- (a) Preparation of foundation.
- (b) Excavation.
- (c) Sheet piling.
- (d) Core walls.
- (e) Back-filling trenches.
- (f) Forming embankment.
- (g) Riprapping upstream face.
- (h) Tunnel approaches.
- (i) Tunnel excavation and lining.
- (j) Controlling works.
- (k) Spillway excavation.
- (l) Spillway walls and lining.
- (m) Force Account Work; which is, in all cases, to be paid for at the actual cost of labor and materials, plus 10%, the Contractor furnishing all necessary plants and tools, unless otherwise specified.

3. *Classification for Payment:*

Payment will be made for the work contemplated in this contract under the following items:

- (a) Grubbing and clearing per acre.
- (b) Dry earth excavation per cubic yard.

- (c) Wet earth excavation by force account.
- (d) Gravel excavation per cubic yard.
- (e) Loose rock excavation per cubic yard.
- (f) Solid rock excavation per cubic yard.
- (g) Back filling per cubic yard. (Paid for as excavation.)
- (h) Forming embankment per cubic yard.
- (i) Excavation in tunnels per cubic yard.
- (j) Placing concrete in tunnel lining or structures per cubic yard.
- (k) Placing steel reinforcement per pound in place.
- (l) Handling and placing valves, castings, piling and structural steel by force account. [444]
- (m) No. 1 common Oregon fir timber in place in structures per 1,000 ft.
- (n) Riprap not hand laid, per sq. yd.

4. *Classification of Excavation:*

All excavation for cut-off trenches, stripping, or excavation for structures shall be classified as excavation, unless the material is placed in embankment, in which case the material will be classified as embankment, the intent being that all material moved shall be paid for once.

All excavation shall be classified as dry excavation, except excavation of earth which is thoroughly saturated with water. This is supposed only to include material lying in swampy ground, and the material which will be classified as wet excavation is that which lies below the elevation at which the surface of the water will stand in the open excavation just prior to the commencement of work.

Material which is under the classification of wet

excavation will be removed by the contractor, if notified in advance of work in writing, under the direction of the Engineer, by force account.

EARTH—Earth excavation shall include all sand, loam, clay, shale, or cemented sand or soft sandstone, or a mixture of earth and gravel containing over 10% of earth or other material which can be plowed with a grading plow and six horses well handled.

GRAVEL—Gravel excavation shall include all gravelly material containing 90% of clear washed gravel.

LOOSE ROCK—Excavation of all boulders between $\frac{1}{2}$ cu. ft. and $\frac{1}{2}$ cu. yd. in volume shall be classified as loose rock. Where it is impracticable to measure the actual percentage of loose rock excavation, the same shall be estimated on a percentage basis by the Engineer.

ROCK—Rock excavation shall consist of solid rock of whatever nature which cannot be plowed by six horses well handled, or boulders of more than $\frac{1}{2}$ cu. yd. in size.

TUNNEL EXCAVATION—Tunnel excavation shall include all excavation estimated by the engineer between the tunnel portals regardless of the ease or difficulty of excavating the same.

The price per cubic yd. for all excavation shall include the furnishing of all plant materials and labor necessary to perform the work. [445]

FORMING EMBANKMENT—The item of forming embankment includes the placing of material in the embankment, all backfilling behind structures

and backfilling of cut-off trenches. All embankment will be paid for by the cubic yard, measurements wherever practicable being made in excavation.

5. *Monthly Estimates and Payments:*

Monthly estimates shall be made by the Engineer of the work completed and material on hand but not yet in place, and the company will on or before the tenth day of each calendar month make payment to the contractor of 90% of these estimates based on the unit contract prices for all work completed, and the actual cost of material on hand, but not in place.

6. *Materials for Construction:*

The unit prices covering the various items of work are intended in all cases, unless otherwise specified in the contract, to include all plant, labor, temporary and permanent construction materials necessary to entirely complete the work, except as hereinafter specified.

The following construction materials will be furnished by the Company.

All cement will be furnished f. o. b. cars at the nearest railroad station. The Contractor's price per cubic yard for placing concrete shall cover the unloading and storing of cement in a dry place until used, and shall include the proper care of and shipping back to the cement mill of all sacks, the freight charges, however, being paid by the Company. Any loss of cement due to improper storage or carelessness on the part of the Contractor will be charged against the Contractor.

All steel reinforcements will be furnished f. o. b.

cars at the nearest railroad station, and the price paid the contractor per pound for placing steel reinforcements will include the unloading, storing and care of same until placed in the work.

All sheet piling, valves & structural steel, hereafter specified will be furnished the Contractor on items which are to be placed by Force Account will be furnished F. O. B. cars at the nearest railroad station, and the Force Account paid the Contractor for placing sheet piling shall include the unloading from the cars and responsibility for the material until placed in the work. [446]

It shall be the duty of the Contractor to make requisition for materials furnished by the Company at such a date that the same can be furnished without delay to work, and the Contractor shall hold the Company harmless from demurrage charges due to delay in unloading materials.

III. MATERIALS AND WORKMANSHIP.

1. *General:*

All construction work of every class in connection with work herein specified shall be done in a workmanlike manner. All due attention shall be given to the relative sequence of the various parts of the work to the end that all parts of the work shall be constructed at such relative times as are necessary to secure the greatest stability and permanence in the completed work when finished.

2. *Cement:*

(a) General.—All cement shall be a true Portland cement made from a mixture of clay and lime carbonate in definite proportions calcined at a high

temperature, and reduced to a fine powder.

All cement shall be delivered at the site of the work in the original package bearing the original stamp and label.

Each sack or barrel shall be clearly marked with the brand and name of the manufacturer.

(b) Fineness.—Ninety-two per cent (92%) of the cement shall pass through a #100 sieve, having 10,000 meshes per square inch, and 80% shall pass through a #200 sieve, having 40,000 meshes per square inch.

(c) Set.—Initial set shall not occur in less than 30 minutes. Final set shall not occur in less than one hour, nor more than ten hours. The time of setting shall be determined by means of Vicat needle apparatus.

(d) Soundness.—A pat of neat cement 2-1/2 in. to 3-in. in diameter and 1/2 in. thick at the center and tapering at the edges must withstand boiling and air pressure without checking, distortion, or softening.

(e) Purity.—Cement shall not contain more than 1.75% anhydrous sulphuric acid, nor more than 4% of magnesia.

(f) Tensile Strength.—Briquettes made of neat cement and water of the shape recommended by the A. S. C. E. and having 1 sq. in. across section shall stand the following tensile tests:

1 day	475 pounds.
7 days...	500 pounds.
28 days...	600 pounds.

3. *Gravel:*

Gravel shall be composed of clean, hard, durable, thoroughly washed pebbles, free from earthy and organic material. One hundred per cent. (100%) of the gravel must pass through a 1-1/2 in. ring, and 0% must pass through a 1/4-in. ring. It shall be screened to remove the sand, which shall afterwards be remixed with it in the required proportions, unless in the judgment of the Engineer the relation of the pebbles to the sand is so uniform as to allow of its being used without screening. In case gravel is used without screening, the same proportion of cement to other materials as is hereinafter specified shall be maintained.

4. *Crushed Stone:*

Crushed stone shall consist of either limestone, granits, or trap rock. The crushed stone shall be clean and free from earthy and organic material. One hundred per cent. (100%) of the crushed stone must pass through a 2-1/2 in. ring, and 0% must pass through a 3/4 in. ring. It shall be screened to remove all fine dust and particles, which shall afterwards be remixed with it in the required proportions, unless in the judgment of the Engineer the relation of the fine to the coarse is so uniform as to allow of its being used without screening. In case the crushed stone is used without screening, the same proportions of cement and other materials as is hereinafter specified shall be maintained.

5. *Sand:*

Sand shall be clean, coarse, sharp, free from clay, lumps, sticks, organic matter, or other impurities.

6. *Concrete:*

(a) General.—All concrete work done under these specifications shall be first class in every particular, and in accordance with the most modern construction practice.

(b) Proportions.—The proportions of the raw materials for concrete shall be exactly determined from time to time in accordance with the relative coarseness of the aggregate, so as to obtain a thoroughly compact concrete free from voids. In general, for gravel concrete, the proportions of cement, sand and gravel will be as follows:

	Cement.	Sand.	Gravel.
For footings, head walls, floors of trenches, etc.	1	4	8
For reinforced concrete work, outside finish and facing walls	1	2-1/2	5
For heavy walls not rein- forced	1	3	6

[448]

(c) Consistency.—A medium of quaking mixture of a tenacious, jellylike consistency, which quakes on ramming, shall be used in mass concrete, such as foundations, heavy walls, etc.

A very wet or mush concrete so soft that it must be handled quickly, that it runs off the shovel shall be used for reinforced concrete work.

(d) Placing.—Concrete shall be conveyed from the place of mixture to different parts of the work in such a manner that no distinct separation of the different ingredients shall occur. In case such

separation takes place, the concrete shall be remixed before placing. Concrete shall be used so soon after mixing that it can be tamped in place as a plastic, homogeneous mass. Any concrete which has set before placing shall be rejected. Noticeable voids or stone pockets discovered when forms are removed shall be immediately filled with mortar mixed in the same proportions as the mortar used in the concrete. No concrete shall be placed in freezing weather.

(e) Surfaces.—Ordinary surfaces shall have no special treatment further than care in placing the concrete to prevent voids or stone pockets. Exposed faces shall be made smooth by spading, that is, by thrusting a spade down between the form and concrete to force back the large stones, thus bringing the fine materials against the forms. Within 24 hours after the removal of forms, all exposed surfaces shall be brushed with a neat cement grout of such consistency as to thoroughly fill and cover all small irregularities in the surface.

(f) Forms.—Lumber used in forms and design of the forms shall be adapted to the structure and kind of surface required on the concrete. For exposed faces the surface next to the concrete shall be dressed. Forms shall be sufficiently tight to prevent loss of cement or mortar, and shall be thoroughly braced and tied together so as to withstand pressure and all strains due to handling concrete. Forms shall be left in place until the concrete has attained sufficient strength to resist accidental thrusts and permanent strains which may come upon it. Forms

shall be thoroughly cleaned before using a second time.

7. *Timber:*

All timber that may be used in construction work under these specifications shall be first grade quality for its purpose, and must be sound, straight-grained, free from water cracks or loose knots, or other imperfections. [449]

8. *Steel and Iron:*

Cast-iron used in the construction of the pipes and valves shall be close-grained, tough, grey cast iron, free from all blow-holes, sand-holes, and all imperfections, of smooth surface, and true to pattern. Cast iron shall have a tensile strength of 18,000 pounds nor more than 22,000 pounds per square inch. All sand, loose scale, etc. shall be removed from castings before erection, and all cuts and bars must be neatly chipped and filed smooth to the general surface of casting before erection. All castings shall be moulded with a sweep wherever practicable.

All steel used under these specifications shall be of medium steel, free from imperfections, straight, full gauge, and true to dimensions. All steel pipe shall be thoroughly cleaned, and have all rust, dirt and scale removed, and shall then be immediately given one coat of approved protective paint. Reinforcing steel shall be of medium steel, having an elastic limit of not less than 45,000 pounds per square inch. It shall stand being 180 degrees throughout the diameter equal to the thickness of the piece without a fracture on the outside of the bent portion. Tensile stress in the steel shall not be more than one-

third of its elastic limit, but in any case shall not exceed 18,000 pounds per square inch. Elongation of steel under working stresses shall not exceed $1/15000$. Steel rods shall not be painted, but shall be free from mill rust and loose scale.

IV. DETAILS OF CONSTRUCTION.

1. *General:*

The dam herein specified is about 2,000 ft. in length, and terminates on one end in a rocky bluff immediately adjacent to the present river bed, and on the other side of the river is located on a gradual slope. The solid rock at one end of the dam stands on a very steep slope, the lower part of which is covered with float rock, which will have to be excavated in order to allow the foundation of the concrete core wall at the end of the dam to be bedded in solid rock. Along the river bed and on the opposite side of the rock there is a layer of gravel of varying thickness averaging about 15 ft. Underneath the gravel is a bed of impervious clay and gravel: From the base of the rock bluff, sheet piling is to be driven in the clay extending across the river and part way up the slope. From the termination of the sheet piling, trench is to be dug through the layer of gravel, and the trench backfilled with material, making a bond with the impervious material underlying the thin gravel layer at the higher elevations. The main fill is to be earth embankment, the upstream face protected by riprap.

The spillway will be constructed by excavation around the end of the dam in solid rock, the spillway being carried far enough below the dam to prevent

any wash on the lower toe.

A tunnel will be constructed through the solid rock [450] around the end of the dam at an elevation approximating the base of the dam. The approaches will be excavated in the float rock, and solid rock to the two portals. Trash racks of iron and steel will be installed at the entrance portals. The controlling works consisting of steel pipes with the necessary regulating valves will be installed at the lower portal. Valves will discharge into a concrete basis, from which water will be discharged into the bed of the river over a measuring weir.

2. *Sequence of Construction:*

The sequence of construction will be to drive and line the outlet tunnel as soon after the commencement of work as possible in order to utilize the tunnel to care for the flow of the stream during construction.

The preparation of foundation and driving of sheet piling should be organized and carried on with such rapidity as to enable the forming of embankment to commence without delay.

Riprap should be placed as the embankment rises and all the detailed structures should be completed and ready for operation when the embankment is finished.

3. *Preparation of Foundation:*

Before the forming of embankment is commenced the foundation of the dam shall be thoroughly plowed to a depth of 10 inches, and all scrub growth, roots and vegetable matter above the ground shall be removed from the site of the embankment. All

soil shall be removed from the upper third of the embankment and placed near the lower toe within the foundation of the embankment, unless ordered wasted by the Engineer.

If, in the opinion of the Engineer, the same shall be necessary to properly bond the embankment into the foundation, additional material shall be stripped from the middle third to such depth as the Engineer may require. This material, when suitable, shall be placed in the lower third of the embankment.

After the removal of the sod from the upper third of the embankment, and after such material as is necessary is stripped from the middle third embankment, the surface shall be again reseeded before the forming of embankment is commenced.

For this work the Contractor will be paid for the actual yardage stripped at the unit price paid for stripping and measurement shall be made of such material as is placed in the spoil banks outside of the base of the embankment, the Engineer making such measurements as are necessary to pay the Contractor once for each movement of material, payment being made either at the unit price for embankment or price for excavation, depending upon which of these items is affected. The cost of plowing the foundation is included in the price paid the Contractor for forming embankment, and the removal [451] of all scrub growth, roots, and vegetable matter above the ground is included in the price per acre for clearing and grubbing.

4. *Driving Sheet Piling:*

Between stations 15 plus 75 and 19 plus 50, approximately, sheet piling will be driven as shown on

the plans. For this work the Contractor will be paid by Force Account and the work shall be done under the immediate direction of the Engineer. The Contractor shall provide such plant as is necessary to complete the driving of piling at such a time as not to delay the commencement of forming enbankment. All piling must be driven to lines and grades set by the Engineer and down to and into impervious material. The Contractor shall employ such skilled labor as is necessary to do this work in a workman-like manner.

5. *Cut-Off Trenches & Core Wall Trenches:*

Core wall trenches and cut-off trenches shall be excavated for the placing of the core wall and puddled material as shown on the plans. This work shall be done and at such a time and with such a force as is necessary to complete the same without delay in forming enbankment.

In general, these trenches will be excavated as shown on the plans but the object in view is to excavate to and into the impervious stratum below the foundation of the dam and such changes will be made as the work progresses as are found necessary.

6. *Back-Filling of Cut-off Trenches:*

Before back-filling the cut-off trench, the surface of the trench shall be thoroughly cleaned from all foreign matter and the exposed surface of the excavation shall be roughened so as to make a thoroughly good bond with the material used for back-filling when placed as below specified.

All back-filling when deposited shall be thoroughly puddled by the use of water, and shall be

compacted by driving horses back and forth over it, or by a similar method approved by the Engineer. The material used for back-fill shall be of such character and so placed that it can be thoroughly puddled as above specified.

Immediately after the completion of any or all back fill, the forming enbankment over the same shall commence and shall not be discontinued until at least 3 ft. of enbankment is formed over all the back-fill in question.

7. *Concrete Core Wall:*

Concrete core-wall shall be constructed approximately between the limits as shown on the plans but the exact length will be determined as the work progresses. Great care shall be exercised in properly bonding the core wall on to [452] the piling and down to and into the impervious material, where not founded on the piling.

Concrete shall be of a quality designated in detail in the specifications "Concrete." All forms shall be firmly and substantially made of undressed lumber. All joints shall be made tightly fitting to prevent the wasting of cement. The joints shall be allowed to overlap and the surface of the concrete shall be as rough as possible to make a thorough bond with the enbankments placed against the core wall.

In general, the height of the core wall shall be kept at one set of forms above the rising enbankment. After the concrete is thoroughly set all forms shall be removed before the enbankment is placed against the wall.

The concrete in the core wall shall be measured to

neat lines as laid out by the Engineer.

8. *Forming Enbankment:*

Enbankment may be formed either by the use of teams or by steam shovels and cars. In case the material is placed by means of steam shovels and cars the Contractor may either raise the enbankment by shifting track, or by placing two trestles; one in the lower toe, and one in the upper toe of the rising enbankment. This system of trestles shall be used for the entire height of the dam and the method of placing material must be as follows:

The material on the outer and inner slope of the enbankment shall be dressed to slope as the enbankment rises. The material between the trestles may be dumped from the cars toward the center of the dam, taking the general slope determined by the angle of repose of the material as dumped; the only limitation being that each trestle shall be used to the extent that practically the same weight of material is carried towards the center of the dam from each trestle. A similar scheme of placing material must be adopted if track is shifted, the object being to place all sloping strata towards the center of the dam. The Contractor shall further use such precautions in the regulation of his work as the Engineer deems necessary until the fill has reached the top of the finished concrete core wall to protect the same against unequal earth pressures from the fill being formed on each side.

The method of puddling this material shall be as follows:—

It is the intention to thoroughly wet the interior

portion of the dam throughout a section of embankment, which extends for a distance of 30 feet each side of the core wall at the base of the dam at the maximum height, with a width of 6 feet of wetted section on the crest of the dam, the limits being defined for various elevations of dam by straight lines drawn between these points. Such labor must be performed and plant furnished to carry out this wetting continuously during the forming of the embankment as is satisfactory to the Engineer. [453] The cost of this wetting, plus 10%, will be paid as hereinafter specified.

In general, it is expected that all of the material developed in the borrow pits is suitable material but the Contractor will be required to leave any large amount of undesirable material in the pits, and will be required within practical limits to so conduct the placing of material in the embankment as to mix the various materials which may be encountered. No frosty material will be allowed placed in the embankment, and the Contractor will be required to so saturate the wetted portion of the dam as to entirely dissolve any lumpy material.

In case embankment is made by teams, the material will be placed on the fill in irregular lifts, the depth of lift being not more than 3 feet. Teams will be required, in going to and from the borrow pits, to pass over the embankment in such a way as to give it a uniform settlement and will not be allowed to track. Before each lift is started, the surface of the previous lift shall be plowed, and such plowing will be done as is necessary to always deposit the mate-

rial on a broken surface.

No steam shovel borrow pits will be allowed within 200 feet of the toe of the embankment, and the borrow pits will be so laid out by the Engineer as not to interfere with the operations or location of any part of the structure.

The price paid per cubic yard for forming embankment shall include all plant, labor, trestling, and other construction materials necessary to properly place the embankment according to these specifications, except that the Contractor will be paid cost, plus 10%, on all labor, plant and materials required in wetting the embankment. All measurements for embankment will be made in excavation.

9. *Riprap*:

Riprap shall consist of 12 inches of stone, roughly but firmly laid on the embankment after the same has been neatly dressed to grade. It is intended that the Contractor shall place selected material containing gravel on the face of the embankment in order to make a bed for the riprap. In case this has not been done the Contractor will be required to spread a bed of 6 inches of gravel before placing the stone. Riprap stone shall in general be 12 inches in depth, but 15% of the stone may be not more than 9 inches in depth providing the same is used to make a tight joint. It is intended in general that the stone shall be laid without dressing and as far as practicable with broken joints. Any irregular stone which will not form a joint or bed must, if used, be roughly dressed with a hammer before laying. After being laid the stone must be rammed, if necessary to a true

firm surface and the joints completely filled with gravel.

In all cases riprap as herein specified shall be measured by taking the area on the sloping surface of the embankment [454] with a depth of 12 inches.

10. *Spillway:*

The excavation of the spillway shall be done to the neat lines as shown on the plans and staked out by the Engineer. Great care shall be exercised not to shatter material outside the neat lines, and all of the material excavated shall be deposited neatly in spoil banks where designated by the Engineer.

The concrete lining for the spillway shall be of the class designated in the specifications as "Facing Walls" and shall be placed as heretofore specified. In case it is found desirable to tie the spillway lining to the rock side walls dowel pins will be placed where designated by the Engineer.

All concrete will be measured for payment to the lines designated by the Engineer and all dowel pins which may be used will be paid by Force Account.

11. *The Outlet Tunnel:*

The limits of the outlet tunnel are approximately given on the plans but the exact location of the portals will be determined as the driving progresses, the intention being to have the entire length of the tunnel that which will be economically developed as the work progresses.

The earth excavation at the inlet and outlet approaches shall all be placed, if suitable, in the embankment.

12. *Tunnel Excavation:*

The excavation of the tunnel between the portals as finally completed, and as measured by the Engineer, shall be classified as "Tunnel Excavation" regardless of the ease or difficulty of removing the same. The Tunnel shall be driven from both ends, working night and day continuously until the work is completed. Great care shall be taken not to shatter the bottom, sides and roof of the tunnel outside the neat lines. It is expected that this tunnel will be driven for its entire length through sustaining rock and that the Contractor will provide such temporary bracing as is necessary to hold the section of the tunnel until the concrete lining is placed. In case bad ground is encountered and a permanent timber lining must be placed back of the concrete the same will be paid for under the item of "Timber In Place In Structures." The measurement of the tunnel excavation shall be to the lines determined by the Engineer.

13. *Concrete Tunnel Lining:*

The concrete tunnel lining shall be placed true to line and grade as shown on the plans, the class of concrete [455] being that heretofore designated in the specifications as "Facing Walls." All forms shall be firmly and substantially made of dressed lumber and the joints so fitted as to give a uniform and smooth surface throughout the barrel of the tunnel. Forms shall be constructed in such a manner that their operation shall be satisfactory to the Engineer, and there shall be sufficient forms to enable the work to proceed continuously until the work is

completed without removing the forms until the work is set. The method of placing concrete is heretofore specified under the general specifications for "Concrete." Concrete will be measured to the lines determined by the Engineer. [456]

14. *Placing Valves, Castings & Structural Steel:*

The item for placing of valves, castings and structural steel includes the unloading and carting from the nearest railroad station to the work, and the storing, care and responsibility of these materials until placed in the work. All structural steel, castings and valves shall be set true to grade and line as shown on the plans. All work requiring the labor of artisans shall be done by men skilled in the special line of work required and of all these parts shall be installed in a workmanlike efficient manner satisfactory to the Engineer.

This work shall be paid for by Force Account, the Contractor being required to furnish all labor and tools necessary to properly carry out the *the* work.

15. *Concrete Structures:*

All concrete structures shall be built to the lines and grades shown on the plans and established by the Engineer. The class of concrete used and the method of placing being as heretofore designated under the heading of "Concrete." All Structures shall be measured to the neat lines as shown on the plans, unless additional work is ordered in writing by the Engineer.

16. *Back-Filling Behind Structures:*

As soon as a structure is completed, forms shall be removed and the necessary back-filling shall be

placed back and around the structure. Back-filling shall be done with selected material, which shall be placed in layers not more than 4 inches in thickness and thoroughly wet and tamped until there will be no appreciable future settlement. Measurements for back-filling shall be made to the lines determined by the Engineer.

17. *Grading & Cleaning up of Site:*

Before the structure is completed as a whole the Contractor shall clean up and grade, and finish in a workmanlike manner, the entire site of the work, and shall remove all nuisance, making any minor repairs or alterations that are necessary to complete the structure as a whole ready for operation.

Pages 1 to 16 approved, in this office, June 2, 1909.

The above numbered sheets in this copy of specifications being identical with the approved copy in this office.

(Signed) D. G. MARTIN,
State Engineer.

May 23, 1910. [457]

PROPOSAL SHEET
FOR THE CONSTRUCTION OF
EARTH DAM AND CONTROLLING WORKS
AT MACKAY RESERVOIR SITE.

Submitted by Corey Bros. Construction Co.

Date _____

1. Grubbing and clearing per acre.....\$ 6.00
2. Dry earth excavation per cubic yard... .25
3. Wet earth excavation by Force Account.
4. Gravel excavation per cubic yard..... .25
5. Loose rock excavation per cubic yard... .50

6.	Solid rock excavation per cubic yard....	1.50
7.	Forming embankment per cubic yard...	.25
8.	Excavation in tunnels per cubic yard...	5.00
9.	Placing concrete in tunnel lining or structures per cubic yard.....	12.00
10.	Placing steel reinforcement per lb. in place.....	Cost plus 10%
11.	Handling & placing valves, castings, pil- ing and structural steel by Force Account.....	Cost plus 10%
12.	No. 1 Common Oregon Fir Timber in place in structures per 1,000 feet....	40.00
13.	Riprap, not hand laid, per sq. yd.....	1.00
14.	Actual cost, haul of cement to site by Co.	
15.	Cost plus 10%, haul of steel to Site by Co.	

Note:—Unit prices refer to work done in accordance with attached specifications. [458]

SPECIFICATIONS FOR CONSTRUCTION OF THE CANAL SYSTEM—CUSTER, BLAINE, BINGHAM AND FREMONT COUNTIES, IDAHO.

1. SCOPE OF SPECIFICATIONS.

It is the intention of these specifications to provide for all labor, tools and materials required to construct an irrigation canal system for the Big Lost River Irrigation Company, in Custer, Blaine, Bingham and Fremont Counties, Idaho, the location of which is more particularly shown on the map attached hereto and made a part of these specifications.

2. PROPOSALS.

Proposals are invited on the construction of the canal and regulating works in connection with the

Engineer's plan and specifications.

Proposals must be accompanied by the attached proposal sheet with full information as outlined.

The right is reserved to reject any and all bids.

III. GENERAL REQUIREMENTS.

1. *Labor, Tools, etc.*

The Contractor is to provide all labor, tools and materials necessary for the complete and substantial execution of everything described, shown or reasonably implied in the drawings of the following specifications, also all transportation of apparatus and appliances of every kind requisite for the completion of the work.

2. *Workmanship and Materials.*

All workmanship and materials shall be strictly first class. All work, methods of construction and material shall receive the approval of the Engineer before acceptance.

All workmen employed by the Contractor shall be thoroughly skilled and competent. All workmen who have proved to be incompetent shall, upon written request of the Engineer, be immediately removed from the work and not permitted to return.

3. *Supervision.*

The Contractor shall keep a competent foreman on the work during working hours, who shall be his representative in all cases where the contractor himself is absent. The Contractor shall see that his employees work in strict harmony with any and all other artisans employed upon the work.

4. *Loss and Damage.*

The Contractor shall be held responsible for any

loss by fire, theft or any other cause, of material and apparatus furnished [459] to him or by him, until the final acceptance of the work as hereinafter specified. Proper care shall be exercised in the protection of such parts of the work as may be damaged by frost, injury or defacement from any source during the process of construction.

5. *Inspection.*

The Supervising Engineer, or his duly authorized representative, shall at all times have access to the work, which work is to be entirely under his control.

The Supervising Engineer may require the Contractor to remove work that in his opinion is not in accordance with these specifications, and substitute without delay satisfactory work. The expense of doing so, and making good other work disturbed by this change is to be borne by the Contractor.

6. *Lines and Levels.*

All grades, lines and levels will be given from bench marks and lines established by the Supervising Engineer. These lines and levels must be followed and payment will only be made for material moved within said lines.

7. *Dimensions.*

The Contractor shall follow dimensions marked on the plans. Where no dimensions are given, directions of the Engineer in charge shall be followed. In no case shall the Contractor be permitted to scale blue prints for dimensions.

8. *Delays.*

No charge shall be made by the Contractor for hindrances or delays due to any cause in the process

of the work, but it may entitle him to an extension of time for completing the work sufficient to compensate for the delay.

The time allowance to be made shall be determined in each case by the Chief Engineer, provided the Contractor shall give the Engineer in charge immediate notice in writing of the cause of the delay.

9. *Extra Work.*

No claims shall be allowed for extra work, unless the same be in pursuance of a written order from the Engineer in charge or unless the Chief Engineer at his discretion shall direct that the claim or such part thereof as he may deem just and equitable be allowed.

10. *Completion of Work.*

The Contractor shall at all times employ a sufficient number of competent and skilled labor to push his work to completion within the specified time.

[460]

The contractor shall employ more men, or shall work longer hours, when so instructed in writing by the Engineer in charge that such increase appears to be necessary in order to complete the work at the specified time.

11. *Omissions.*

Any omission of the specific mention of any petty detail necessary to make any part of the installation complete shall in no wise relieve the Contractor from finishing his work in a thoroughly workmanlike manner, and to the satisfaction of the Engineer in charge.

IV. *General Description.*

1. *Purpose and Description of Canal System:*

The general object of the system is to supply water for irrigation by diverting a portion of the flow of the Big Lost River at the headgate of the Blaine Canal, through which canal such diversion is carried for approximately 15-1/2 miles.

The following canals in Blaine, Custer, Bingham and Fremont Counties in the State of Idaho, and whose more definite location is shown on the accompanying drawings, together with their headgates, diverting dams, drops and all other structures necessary to their completion for operation comprise the work to be done under these specifications:

Name.	Approximate Length Miles.	Capacity Second-feet.
Blaine Canal	15.5	1275
Blaine Canal	3.1	1035
Era Canal	3.4	300
Arco Canal	8.3	100
North Side Canal		
Northeast Canal		
South Side Canal		

V. *Canals.*

1. *Cross Section and Gradient of Canals.*

The water area, gradient and velocity of each canal shall be approximately the same, whether it be in side hill section, having slopes 3 to 1, or greater, or in level section with practically no side hill slope. Values for the water area, gradient and velocity of each canal are shown on the accompanying drawings, as well as dimensions for the level and side hill sections. [461]

2. *Excavations.*

That portion of the canal section in cut shall be

excavated true to grades set by the Engineer; the bottom shall be left smooth and shall not vary more than .1 at any point above or 0.5 below the correct grade elevation at that point.

The sides of the canal section in cut shall have a uniform slope of $1\frac{1}{2}$ on 1. The finish left by plowing and scraping in removing the excavated material will be considered sufficient finish for the side slopes when done in a workmanlike manner, and in general no extra smoothing or dressing down of the slopes will be required. But whenever in the opinion of the Engineer the side slopes are not finished in a workmanlike manner, the same shall be brought to the finish required either by hand with pick and shovel, or by dragging with teams.

The portion of the canal in cut shall be cleaned of all loose material and debris before being accepted.

No earth shall be borrowed from the bottom or sides of the canal section. Whenever possible, all borrow shall be made adjacent to the outer toe of the upper embankment, and such borrow shall be excavated in a neat and workmanlike manner.

Whenever in the opinion of the Engineer borrow is necessary at points not covered above, such borrow shall be made only at such points and in such manner as the Engineer may direct.

No material shall be paid for which is excavated beyond the neat lines of the cut sections, as shown on the attached plans.

3. *Embankment.*

The canal embankments shall have a minimum section as shown on the accompanying drawings, and in

all cases the top of the embankment shall be left smooth and neat.

The entire ground surface which shall fall within the limits of the outer and inner toes of the embankment shall be thoroughly plowed in a direction ~~a~~parallel to the canal alignment, and all brush, stones or debris of any kind removed before any material is placed as embankment.

Where new embankment is placed over the present embankment, as will be the case with the North Sude Canal, to be enlarged from 220 second feet to 350 second feet capacity, the old embankment shall be cleaned of all brush, stones or debris of any kind, and the entire surface thoroughly plowed in a direction parallel to the canal alignment before any new embankment is placed.

The material forming the embankment shall be free from any material which in the judgment of the Engineer might allow the [462] percolation of water through the embankment. Material placed as embankment shall be placed in horizontal layers not exceeding 12 inches in thickness, and each layer shall be thoroughly compacted by rolling or grading teams before the next layer is placed. The successive layers shall be kept smooth and regular, and the top surface of the last layer shall be loosened either by light plowing or harrowing before the next layer is placed, whenever in the opinion of the Engineer such procedure may be necessary to insure a good bond.

Waste material shall be placed in neat spoil banks at such places as the Engineer may designate. Whenever possible waste material shall be deposited

in such manner as to strengthen the lower embankment.

The length of Free Haul shall be 200 ft. measured from center of gravity of embankment to center of gravity of excavation. An allowance of $1\frac{1}{2}$ cents per cu. yd. per 100 ft. over haul shall be made.

[463]

SPECIFICATIONS FOR CONCRETE.

I. *Materials.*

1. *Cement.*

All cement used shall conform to the specifications for Portland Cement.

2. *Sand.*

All sand shall be clean, coarse and sharp, and shall be free from clay, loam, sticks, organic matter, or other impurities.

3. *Crushed Stone.*

Crushed stone shall be perfectly clean and entirely free from earth and organic material. One hundred per cent (100%) of the crushed stone shall pass through a $2\frac{1}{2}$ inch ring and 0% shall pass through a $\frac{1}{4}$ inch ring. All crushed stone shall be screened to remove all fine dust and particles, which shall afterwards be mixed with it in the required proportions, unless in the judgment of the Engineer the relation of the fine to the coarse is so uniform as to permit of its being used without screening. In case the crushed stone is used without screening, the same proportion of cement to other materials as is hereinafter specified shall be maintained.

4. *Gravel.*

Gravel from the river bed may be used for concrete, provided it is clean and free from all dirt or vegetables or clayey material, and contains no stones larger than will pass through a 2½ inch ring.

II. *Mixing.*

1. *General.*

The method of mixing the ingredients of concrete shall be of such a character that the several constituents are evenly and uniformly distributed through the resultant made.

The mixing shall also be accomplished in such a manner that there shall be ample time in which to place the concrete before any portion shall have taken the initial set. [464]

2. *Proportions and Consistency.*

The proportions of the raw material for concrete shall be exactly determined from time to time, in accordance with the relative coarseness of the aggregate, so as to obtain a fairly compact concrete free from voids.

In general for crushed stone concrete the proportion of cement, sand, crushed stone or gravel will be as follows:

	Cement.	Sand.	Crushed Stone or Gravel.
For footings near walls, abutments and the out- side 2 ft. around reg- ulating works struct- ure	1	3	5
For reinforced work	1	2	4
For all other concrete	1	3	5

A mixture of jellylike consistency gently quaking on a tamping shall be used for mass concrete, such as the heavy walls.

Very wet or mushy concrete, so soft that it will run off the shovel unless handled quickly, shall be used for facing very thin walls and for reinforced concrete.

III. *Placing.*

1. *General.*

All concrete work done under these specifications shall be first class in every particular, and in accordance with the most modern construction practice.

2. *Transporting.*

Concrete shall be conveyed from place of mixing to different parts of the work in such a manner that no separation of the different ingredients shall occur. In case such separation takes place, the concrete shall be mixed before placing.

3. *Set.*

Concrete shall be used so soon after mixing that it can be tamped in place as a plastic, homogeneous mass. Any concrete which has been set before placing shall be rejected.

4. *Voids.*

Noticeable voids or stone pockets discovered when forms are removed shall be immediately filled with mortar mixed in the same proportion as the mortar used in the concrete. [465]

5. *Continuous Work.*

The following shall constitute sections for continuous work: (1) each footing course for bed of wall; (2) each wall or pier from footing course to top in such a way as the Engineer may direct, always providing deep transverse channels where work is allowed to set before the next section is placed thereon.

Each of the above sections shall be carried on continuously when once started night and day, if possible, that is, each layer shall be well rammed in place before the previously deposited layer shall have had time to partially set.

6. *Surfaces.*

Ordinary surfaces shall have no special treatment further than care in placing the concrete to prevent voids or stone pockets. Exposed faces shall be made smooth by spading; that is, by thrusting a spade down between the form and the concrete to force back the large stones, thus bringing the fine material against the forms. Within 24 hours after the removal of forms, all exposed faces shall be brushed with a neat cement grout of such consistency as to thoroughly fill and cover all small irregularities in the surface.

7. *Forms.*

Lumber used in forms and in the design of the forms shall be adapted to the structure and kind of surface required on the concrete. For exposed faces,

surfaces next the concrete shall be dressed. Forms shall be sufficiently tight to prevent loss of cement or mortar, and shall be thoroughly braced and tied together so as to withstand pressure and all stresses due to handling concrete. Forms shall be left in place until the concrete has obtained sufficient strength to resist accidental thrusts and permanent stresses which may come upon it. Forms shall be thoroughly cleaned before using a second time.

8. *Frozen Concrete.*

No concrete shall be placed during freezing weather unless thoroughly protected and with the approval of the Engineer.

9. *Dimensions.*

All structures, course walls, abutments, etc., shall be constructed according to the designs and to the dimensions shown in the drawings herewith, which are made a part of these specifications. [466]

SPECIFICATIONS FOR PORTLAND CEMENT.

I. *General.*

All cement shall be a true Portland Cement made from a mixture of clay and lime carbonate in definite proportions, calcined at a high temperature, and reduced to a fine powder.

All cement shall be delivered at the site of the work in the original package bearing the original stamp and label.

Each sack or barrel shall be clearly marked with the brand and name of the manufacturer.

All cement failing to meet the requirements of the specifications will be rejected. All rejected cement, whether damaged or rejected for other causes, shall be removed at once by the Contractor.

The selection of the sample for testing must be left to the discretion of the Engineer, but shall be a fair average of the contents of the package from which it is taken.

II. *Fineness.*

Ninety-two per cent. (92%) of the cement shall pass through a #100 sieve, having 10,000 meshes per square inch, and 80% shall pass through a #200 sieve, having 40,000 meshes per square inch.

III. *Set.*

Initial set shall not occur in less than 30 minutes. Final set shall not occur in less than 1 hour, nor more than 10 hours. The time of setting shall be determined by means of Vicat needle apparatus.

IV. *Soundness.*

A pat of neat cement $2\frac{1}{2}$ inches to 3 inches in diameter and $\frac{1}{2}$ inch thick at the center and tapering to the edges must withstanding boiling and air exposure without checking, distortion or softening.

V. *Purity.*

Cement shall not contain more than 1.75% Anhydrous sulphuric acid, nor more than 4% magnesia.
[467]

VI. *Tensile Strength.*

Briquettes made of neat cement and water in the shape recommended by the A. S. C. E. and having 1 square inch center cross section, shall stand the following tensile tests:

Briquettes for 24-hour tests shall be allowed to set 24 hours in moist air.

Briquettes for 7-day and 28-day tests shall be allowed to set one day in moist air, and the remainder of the period in water.

Neat 24-hour tests shall not show less than 175 lb. per sq. inch. Neat 7-day tests shall not show less than 500-lb. per square inch.

Neat 28-day tests shall not show less than 600 lb. per square inch.

Filed April 25, 1912. A. L. Richardson, Clerk.
[468]

Plaintiff's Exhibit No. 24.

CONSTRUCTION CONTRACT.

THIS AGREEMENT, Made this 18th day of Sept. 1909,

WITNESSETH, That Union Portland Cement Company agrees to sell and The Big Lost River Irrigation Company, Mackay, Idaho, agrees to buy and take delivery of during the year 1909-10 all the cement required for the construction of Dam and Ditch work known as the Big Lost Land and Irrigation Company project, Mackay, Idaho, or Twenty-five Thousand barrels of Red Devil Cement (four sacks equalling a barrel) at the price of Two Dollars and Eighty Four cents, per barrel, in carload lots, F. O. B. Mackay and Moore, Idaho, sacks extra. Delivery at central freight station, any charges for switching or demurrage at destination to be at expense of purchaser. Purchaser hereby agrees to take delivery at destination, subject to the rules and

regulations of transportation company delivering same. Freight to be paid by purchaser and same to be credited to purchaser's account upon return to seller of receipted freight bill. This contract shall last during the year 1910 and shall expire with the 31st day of December of that year.

TERMS.—30 days; 1 per cent off the net amount for cash in 10 days; no discount allowed on sacks or freight.

QUALITY.—Cement to be guaranteed to fulfill the specifications and requirements of the American Society of Civil Engineers. Seller's liability to cease when cement is delivered to the U. P. Co. at Devil's Slide, Utah. Purchaser to have the right to have cement tested at the factory before acceptance at Devil's Slide, Utah, if desired.

SACKS.—Cement to be packed in jute, cotton or canvas sacks and charged to purchaser at 10 cents each. The seller to pay 10 cents each for empty Red Devil Cement sacks returned by the purchaser [469] to the seller in good condition. The seller's count and acceptance of sacks returned to be the basis of credit. Purchaser to pay the railroad freight on returned sacks.

DELIVERIES.—Deliveries are to be taken by the purchaser at the rate of 2000 to 4000 as advised barrels per month during 1909 and 10.

Seller shall not be held responsible for deliveries when prevented by strikes, lockouts, accidents, fires, floods, shortage of cars, or other causes over which seller has no control.

If purchaser fails to make any payment hereunder,

when the same becomes due, or fails in any way to perform the conditions of this contract, the seller may, at its option, cancel contract. Time is and shall be of the essence of this agreement.

This contract shall not become operative or binding upon the Union Portland Cement Company until it has been approved by one of the Executive Officers of said Company at the home office in Ogden, Utah, and a copy with such approval forwarded to purchaser.

IN WITNESS WHEREOF, the Seller and Purchaser have hereunto set their hands and affixed their seals in duplicate the day and year first above written.

Seller:

UNION PORTLAND CEMENT COMPANY.

By JAMES PINGREE,

Secretary.

Purchaser:

BIG LOST RIVER IRRIGATION CO.

By C. B. HURTT,

President.

Witness:

O. B. GILSON.

Witness:

Filed April 25, 1912. A. L. Richardson, Clerk.
[470]

Plaintiff's Exhibit No. 32.

**CERTIFICATE OF QUALIFICATION OF
FOREIGN CORPORATION.
STATE OF IDAHO.**

DEPARTMENT OF STATE.

I, ROBERT LANSDON, Secretary of State of the State of Idaho, do hereby certify that the COREY BROS. CONSTRUCTION CO., a corporation duly organized and existing under the laws of the State of Utah, has fully complied with Section 10 of Article XI of the Constitution, and Section 2653 of the Revised Statutes of Idaho, as amended by an Act approved March 10, 1903, by filing in this office on the Fifth day of August, 1909, a properly authenticated copy of its Articles of Incorporation, and a certificate of the appointment of J. H. GREENE of Mackay in the County of Custer, State of Idaho, as agent for said Corporation within the State of Idaho, upon whom process issued by authority of, or under any law of this State, may be served.

And I further Certify, That said Corporation has accepted the provisions of the Constitution of the State of Idaho for all the intents and purposes contemplated by the provisions thereof, relating to such acceptance, by other than municipal corporations (Art. XI, Sec. 7), all of which are recorded in Book "A" of Foreign Incorporations.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Great Seal. Done at Boise City, the Capital of Idaho, this Fifth day of August, in the year of our Lord one thousand nine

hundred and Nine, and of the Independence of the United States [471] of America, the one hundred and thirty-fourth.

(Seal)

ROBERT LANSDON,
Secretary of State.

Filed April 25, 1912. A. L. Richardson, Clerk.
[472]

Plaintiff's Exhibit No. 65.

THIS AGREEMENT, Made and entered into this 16th day of February, 1910, by and between The Arnold Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, hereinafter called the Engineer; and the Big Lost River Irrigation Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, hereinafter called the Client, WITNESSETH:

That in consideration of the covenants hereinafter set forth, the parties hereto agree each with the other, as follows:

ARTICLE I.

(1) This contract is intended to include all the engineering work of whatsoever nature necessary to complete the irrigation system of the Big Lost River Irrigation Company, located in Blaine County, Idaho, ready for operation as a completed irrigation system.

(2) It is mutually agreed between the parties hereto that the work to be done by the Engineer shall be segregated for payment as engineering and force account engineering. Engineering shall be paid for

upon a percentage based on the construction cost as hereinafter specified, and force account engineering to be paid for on the basis of the actual engineering pay roll as hereinafter specified.

ARTICLE II.

Engineering to include all surveys, plans, estimates, specifications, and supervision of construction for the entire work as follows: [473]

(1) The Engineer agrees to make all surveys, plans, estimates, and specifications which are necessary preliminary to the letting of contracts for the construction of the structures and canals for the entire project.

(2) To furnish five (5) copies of all plans and specifications for the entire work, and to assist and co-operate with the Client in securing proposals for the construction of the various parts of the work specified, and in letting contracts for the same.

(3) To furnish the Client with a report covering the possible methods of developing the project with recommendations as to the best sequence for carrying on the construction of the various parts of the work.

(4) To supervise the construction of the irrigation project herein specified, and to interpret the plans and specifications, and for this purpose shall furnish a competent supervising engineer, who shall represent the Engineer on the construction work, and such a field force as is necessary to stake out the work and measure the same for payment.

(5) To supervise and inspect all materials entering into the work, and shall, if requested in writing, furnish and submit to the Client all necessary records in connection with such inspection.

(6) The Engineer shall employ and direct such inspectors of work as he may deem necessary to the proper execution of the work, the payment for such inspectors being made as hereinafter specified.

(7) To prepare and submit to the Client monthly estimates setting forth the amount of work done and moneys [474] due contractors on account of any and all construction work performed and done under the plans and specifications for the work herein contemplated.

(8) To furnish all surveying instruments, construction field books, and drawing materials, and to save the Client free from all salary obligations and office expense of engineer, except as hereinafter specified.

ARTICLE III.

(1) The Client agrees to pay the Engineer for making the surveys, plans, estimates, and specifications as heretofore described a fee of three per cent. (3%) on the actual cost of construction, as evidenced by the final contract figures, or upon the Engineer's estimated cost of the work based on these plans, if the same is not constructed.

(2) The Client further agrees to pay the Engineer for supervision of construction, as heretofore described, an additional two per cent (2%) based on the final contract figures.

ARTICLE IV.

Force account engineering will include such work done by the Engineer as should properly be chargeable to construction, and such items of engineering as are uncertain in quantity, and which can be per-

formed by the Engineer to the Client at a more reasonable cost when based on the actual cost of the engineering work.

Force account engineering is intended to cover such items as checking up the surveys or engineering work done previous to this contract; surveys to establish section corners for the subdivision of land; such contour [475] surveys of the land to be irrigated as the Engineer considers necessary to economically design the irrigation system; surveys for filing purposes, rights of way or promotion, together with maps and plans as are required in connection with the above surveys, or any engineering work which is not embraced under engineering as heretofore described, which the Client may require.

The force account work contemplated under this contract consists of the supervising of soundings or borings for foundations, the employment of necessary inspectors to actually supervise the placing of material in the structures, or engineering field work of any nature whatsoever that the Client may require done under the direction of the Engineer, or which the Engineer shall consider necessary to properly prosecute the work.

ARTICLE V.

It is mutually agreed that the first payment of the three per cent (3%) engineering fee for any particular part of the work shall be one per cent (1%) of the Engineer's estimated cost, and shall be due and payable in cash on the completion of one-half of the engineering work for that particular part of the project as evidenced by the plans and specifications

in the Engineer's office; and the second payment likewise at one per cent (1%) shall be due and payable in cash when the plans and specifications are delivered to the Client. The balance of the engineering fee shall be payable thirty (30) days after the date of delivery of the plans and specifications, and shall be based on the Engineer's estimate of the cost of that particular piece of work. Final adjustment as to the fee for work the Engineer is entitled to shall be made at the date of final [476] estimate of the cost of the same to the Client.

It is mutually agreed that the payments on the two per cent (2%) engineering fee for supervision are to be due and payable in monthly installments as the work progresses, payments to be based on the cost of the work done to date, and the same to be due ten (10) days after the receipt of the monthly statement by the Client.

ARTICLE VI.

It is mutually agreed that the Engineer shall submit to the Client at the end of each month;

(1) A statement of expenditures for materials supplied by the Engineer, properly chargeable to the Client hereunder, and the Client will pay the same within ten (10) days from receipt thereof;

(2) The Engineer shall submit to the Client at the end of each month receipted pay rolls and other expenditures for materials and supplies properly chargeable to the Client hereunder for force account engineering, and the Client will pay the Engineer the same within ten (10) days from receipt thereof.

ARTICLE VII.

General. It is mutually understood and agreed that the Client will supply any and all tools or materials which the Engineer finds necessary for work done as force account engineering, and that the Engineer will assist the Client in every way to obtain materials and tools suitable for the work to be done.

The Client agrees to pay the cost of the traveling and living expenses of representatives of the Engineer while away from Chicago engaged on the work of the Client, [477] and further agrees to provide adequate and suitable transportation for parties in the field satisfactory to the Engineer.

The Client further agrees to provide such commissary and commissary equipment as are necessary to keep the various engineering forces in the field within reasonable distance of their work.

The Engineer agrees during the progress of the work to furnish the Client with any additional blue prints of plans or copies of specifications or report made on those items of work paid for on the percentage basis at cost, if so requested by the Client.

It is further mutually agreed that the sequence in taking up the engineering work contemplated in this project shall be determined from time to time by mutual agreement between the Client and the Engineer, such understanding to be confirmed in writing.

It is further understood that the Engineer will immediately proceed with the engineering work for that part of the project so agreed upon on receipt of written confirmation from the Client.

IN WITNESS WHEREOF, The parties hereto have executed this instrument in duplicate the day and year first above written.

THE ARNOLD COMPANY,

By W. L. ARNOLD,

Vice-President.

(Seal) Attest: R. G. ARNOLD,

Secretary. [478]

BIG LOST RIVER IRRIGATION COMPANY,

By C. B. HURTT,

President.

(Seal) Attest: JOHN P. ROOS, Jr.,

Secretary.

Filed April 25, 1912. A. L. Richardson, Clerk.
[479]

Plaintiff's Exhibit No. 83.

(TELEGRAM)

Salt Lake, Utah, Oct. 6.

Corey Bros. Constn. Co.,

Kackay, Ida.

Telegraph confirmation order Fairbanks Morse for pump and pipe.

H. RASCHBACHER. 11:10 AM.

Filed July 1, 1912. A. L. Richardson, Clerk.
[480]

Plaintiff's Exhibit No. 84.

Cheyenne, Wyo., Sept. 7, 1909.

Corey Bros. Const. Co.,

Mackay, Idaho.

Gentlemen:—

The writer has placed an order for a low service

tank pump capable of working under about 190 ft. head with a discharge of about 150 gals. per minute with Fairbanks-morse and Co. at Salt Lake. With

pump
this ~~upmp~~ will come suction pipe, one L and one bushing and also 800 ft. 3 in. black pipe, all they had in stock and probably enough for immediate needs at the dam. These goods were to be sent by freight and shipment was to be made to-day.

The price f. o. b. Salt Lake was \$167.50 for the pump; \$10.10 for the suction pipe, \$0.80 for the L and .20 for the bushing.

The goods for the pile driver were ordered from The Salt Lake Hardware Co. and were to be shipped to-day by freight.

Pipe for the pump, \$24.92 per 100 ft.

Very truly yours,

H. RASCHBACHER,

Resident Engineer, The Arnold Co.

Filed July 1, 1912. A. L. Richardson, Clerk.

[481]

Plaintiff's Exhibit No. 85.

CORAY BROS. CONSTRUCTION CO.

Rail Road Contractors,

Main Office, Ogden, Utah.

Mackay, Idaho, October 25, 1909.

Mr. W. H. Rosecrans,

Chief Engineer The Arnold Co.,

Chicago, Illinois.

Dear Sir:—

Knowing that you have a good many projects under way, where you are using a large number of

Engineers, we are writing to ask if it is possible for you to transfer Mr. Coy to some other place, without inconveniencing yourself or your Company, as it is very unsatisfactory for us to work under him, and if possible we would like to have a man who could make his wants known without doing so in an overbearing and insulting manner, as we are perfectly willing to do anything required.

We have made no objection to Mr. Raschbacher, or Mr. Drummond regarding Mr. Coy, and if you cannot see your way clear to make the change as above, we trust you will say nothing regarding this letter, as we will have to try and go along the way we are, and do the best we can, but we assure you it is a hard matter for us to get along with Mr. Coy.

This is the first time in our experience that we have asked a favor of this kind, and if you can grant it, we assure you that it will be greatly appreciated by us.

Yours very truly,

COREY BROS. CONSTRUCTION CO.

By _____,

President.

Filed July 1, 1912. A. L. Richardson, Clerk.
[482]

Plaintiff's Exhibit No. 86.
THE ARNOLD COMPANY,
Engineers Constructors,
Electrical—Civil—Mechanical,
181 La Salle Street,
Chicago.

November 6, 1909.

Corey Bros. Construction Company,
Mackay, Idaho.
Attention of Mr. W. W. Corey, President.

Gentlemen:—

In conformity with your request we have arranged to transfer Engineer Coy to other work and will place Mr. Frederick Greeley in charge. We may not be able to complete this change before the 15th of this month.

Hoping that the matter will be thus agreeably adjusted, we are,

Yours very truly,

THE ARNOLD COMPANY,
By **W. H. ROSECRANS,**
Chief-Engineer Hydraulic Dept.

Filed July 1, 1912. A. L. Richardson, Clerk.

[483]

,
at
hy
ent.

Plaintiff's Exhibit No. 88.

THE ARNOLD COMPANY,
Engineers Constructors,
Electrical—Civil—Mechanical,
181 La Salle Street,
Chicago.

March 3, 1910.

Corey Bros. Construction Company,
Mackay, Idaho.

Gentlemen:—

We have been advised that the five taintor gates complete for the diversion dam and intake works, Blaine Canal, along with the grid racks for the tunnel entrance—Mackay Dam, were shipped 22nd ult. from Indianapolis, Indiana. This material was shipped in two cars described as follows:

P. C. C. & St. L. car #939538.

Vandalia car #14422.

The routing was as follows:

Vandalia, Iowa Central, Santa Fe, Union Pacific.

Trusting the above information will assist you in locating this material, we are,

Very truly yours,

W. H. ROSECRANS,

Chief Engineer Hydro-Electric Dept.

AHM—S.

Filed July 1, 1912. A. L. Richardson, Clerk.
[484]

Plaintiff's Exhibit No. 89.
THE ARNOLD COMPANY,
Engineers Constructors,
Electrical—Civil—Mechanical,
181 La Salle Street,
Chicago.

August 18, 1909.

Mr. W. W. Corey, Prest.,
Corey Bros. Construction Co.,
Ogden, Utah.

Dear Sir:—

We are in receipt of your telegram of the 4th inst. reading as follows:—

“Place order for us for any material required in construction of Big Lost River Project.”

We have received several letters from our Resident Engineer, Mr. Raschbacker, in which he requests that we order in your name material to be used in connection with the carrying on of the Big Lost work. The orders that Mr. Raschbacker sent us cover reinforcing rods for concrete work and cement. Upon receipt of these letters we wired Mr. Raschbacker to get your written authority for placing these orders, which will explain Mr. Raschbacker's request for your authorization.

We will be very glad to render you such assistance as we can in connection with the purchasing of steel for reinforcing valves, and such other material as requires an engineering knowledge of conditions that are to be met, but we do not quite understand why you ask us to get quotations for you upon cement.

It occurs to us that you are really in a better position to get favorable quotations on material than we would be, as you are more familiar with the local markets. We do not want to assume the work incidental to placing the orders for material on this work, nor the work that would necessarily grow out of the placing of these orders incident to seeing that the orders are filled and the material delivered. You can readily see that this is going to require a considerable amount of attention and it is a service that we are not under contract to render, neither could we in reality afford to do it.

As stated above, we will be very glad to render you every assistance in the purchasing of special steel, valves, etc., that you are not in a position to handle, but on all your miscellaneous material we would request that you arrange for and order this direct as far as possible.

Yours very truly,

R. G. ARNOLD,

RGS/JMH.

Treasurer.

Filed July 1, 1912. A. L. Richardson, Clerk.
[485]

Plaintiff's Exhibit No. 90.

August 24th, 1909.

The Arnold Company,
181 La Salle St.,
Chicago, Illinois.

Gentlemen:—

We have placed an order with the Union Portland Cement Co. of this City for 6 cars of Cement

vs. Corey Bros. Construction Company et al. 551

@ \$2.84 per BBl. fob. the cars at Mackay and Moore, Idaho, for use on the Big Lost River Project.

The Union Portland Cement Co. of Ogden bid \$2.84 per BBl., and as that is as cheap as the lowest quotations received we would suggest that it would probably be more satisfactory to deal with them, as the freight haul is much shorter than from the other factories, so we should be able to get much more prompt deliveries on orders from them, than we could expect from the other factories.

Yours very truly,

COREY BROS. CONSTRUCTION CO.,

By _____,

President.

W.W.C./A.

Filed July 1, 1912. A. L. Richardson, Clerk.

[486]

Plaintiff's Exhibit No. 91.

Mackay, Idaho, July 31, 1909.

The Corey Bros. Construction Co.,

Mackay, Idaho.

Gentlemen:

Please send us at the earliest possible moment a complete list of your sub-contractors, giving their contracts on the various canals by station numbers and also those laterals, which properly belong to their contracts.

We also request that you notify your various camps and sub-contractors' camps that all bills for board against our engineering parties as well as all Force Account statements must be rendered and

forwarded to Goyne Drummond at Moore, Idaho, for approval by the 27th of each month in order to be returned with the monthly estimate and bills for that month. This is equivalent to starting the monthly accounts on the 27th instead of the 1st of each month. The above applies only to the canal lines and similar bills at the Mackay dam should be rendered to F. A. Coy on the 27th of each month.

Yours very truly,

THE ARNOLD COMPANY.

By H. G. RASCHBACHER,

HGR—M.

Filed July 1, 1912. A. L. Richardson, Clerk.
[487]

Plaintiff's Exhibit No. 92.

Trowbridge & Niver Co.

(Incorporated)

MUNICIPAL BONDS.

CHICAGO.

First National Bank Building.

Chicago, Ill., July 8, 1909.

Messrs. Corey Brothers,
Ogden, Utah.

Gentlemen:

We are in receipt of the estimates on account of your work at the Mackay Reservoir Dam and on the Big Lost River Irrigation Co. Canals, from The Arnold Company, totaling \$25,190.68, and you will find herewith our draft on the First National Bank of this city, to your order, for this amount.

vs. Corey Bros. Construction Company et al. 553

Kindly receipt voucher and return it to us, and oblige,

Yours very truly,
TROWBRIDGE & NIVER CO.,
D. N. NIVER, Vice-Pres.

DRN/F.

Encl.

Filed July 1, 1912. A. L. Richardson, Clerk.

Plaintiff's Exhibit No. 93.
TROWBRIDGE & NIVER CO.
Established 1893.
MUNICIPAL BONDS.
CHICAGO.

Long Distance Telephone:

Randolph 2791.

First National Bank Bldg., Chicago,

February 12, 1910.

Corey Bros. Construction Company,
Ogden, Utah.

Gentlemen:

Upon my return to the city this morning I had a letter from Drummond, in which he speaks of having notified you to push the work.

In explanation I wish to say that I think Mr. Corey and ourselves thoroughly understand each other on this situation. [488] I believe that he is, and has been, doing his best to complete the work on record time. We called the engineers to task pretty sharply for their delays in getting matters in shape, and so they probably took it upon themselves to rap the contractor a little.

While we are anxious to have this work completed in the near future, we believe Mr. Corey is doing everything he can in that line, and do not wish to appear to be nagging all the time.

Yours very truly,
TROWBRIDGE & NIVER CO.,
G. S. SPEER,
Vice-President.

GSS—AA.

Filed July 1, 1912. A. L. Richardson, Clerk.
[489]

Plaintiff's Exhibit No. 94.
TROWBRIDGE & NIVER CO.
Established 1893.
MUNICIPAL BONDS.
CHICAGO.

Long Distance Telephone:

Randolph 2791.

First National Bank Building, Chicago.

March 12, 1910.

Mr. W. W. Cory,
Ogden, Utah.

Dear Mr. Cory:

We regret very much to inform you that the Kenefick-Quigley Construction Co.'s bid was considerably under yours in all parts except the rock, where you seemed to break about even. We regret this on your account and partly upon our own account because of the very satisfactory way in which you have handled your other work. We would have been glad, indeed, to have seen you the General Contractor for the

Colorado Southern Irrigation Company Project. Although, of course, it cannot be anything but satisfaction to us viewed from the other standpoint to see the Colorado Southern Co. get such a satisfactory bid at this time.

Messrs. Brown and Register, and Register's engineers, were here for some time, during which time the entire situation was thoroughly canvased and it was agreed to let the work to the Kenefick Company, although the formal contract has not yet been executed. It was also agreed that the work would not all be let at this time but that the Company would proceed with the construction of the canals on the south side, and one reservoir which would be called the first unit of the system, that the Company would get this unit completed and some revenue coming in before it opened up the other work, and thus play safe having [490] water contracts on hand at all times to complete whatever work was started.

We are pleased to note that you are organizing your forces on the Lost River and that you will be at work in a short time with full forces. Have written the State Engineer of Idaho requesting him to make a trip of inspection in the near future and to report the progress that was being made, so that if there was reasonable assurance that water would be available for all the farmers who needed it by May 1st, that the Company could send out the necessary thirty days' notice to the land owners and thus come under the wire for the Spring of 1910. We sincerely trust that you will be able to convince the State Engineer that you will be able to deliver water by May 1st even though the reservoir and some other

parts of the project may not be entirely completed by that time.

This will make the quickest Carey Act project ever constructed and ought to be a splendid advertisement for both Corey Brothers and Trowbridge & Niver Company and we wish to compliment you on the way in which you have handled the work and only regret that you were not the successful bidder on the Colorado Southern project.

With kindest regards and sincere wishes that we may locate another project in the near future which we can work to mutual advantage, I am,

Yours very truly,
TROWBRIDGE & NIVER CO.,
G. S. SPEER,
Vice-President.

Filed July 1, 1912. A. L. Richardson, Clerk.
[491]

Plaintiff's Exhibit No. 95.
TROWBRIDGE & NIVER CO.
Established 1893.

MUNICIPAL BONDS.
CHICAGO.

Long Distance Telephone:
Randolph 2791.

First National Bank Building, Chicago.
March 29, 1910.

Mr. W. W. Corey,
Ogden, Utah.

Dear Corey:

Replying to your various telegrams, and those

received from Stephenson, Hurtt and Drummond.

We understand that it will be hardly possible for you to deliver water on all of the tract May 1st. Our instructions to Stephenson are to send out notices to the entrymen on all land where we are reasonably sure of being able to deliver water May 1st. You should then concentrate your forces on that portion of the system, leaving the remainder of the tract to be completed during the summer, at your leisure.

We are very anxious to deliver water to as much of the land as possible May 1st, but beyond this, are not anxious to push the work because the Company is not in position to deliver bonds at this time, and will not be for from thirty to sixty days.

We fully appreciate the strenuous efforts which you are putting forth for the completion of this work.

Yours very truly,

TROWBRIDGE & NIVER CO.,

G. S. SPEER,

Vice-President.

GSS-OC.

Filed July 1, 1912. A. L. Richardson, Clerk.
[492]

Defendants' Exhibit No. 34 is embodied in Plaintiff's Exhibit No. 23, being specifications attached thereto. [493]

Defendants' Exhibit No. 77.
FOR CAREY ACT LANDS.

No. _____

BIG LOST RIVER IRRIGATION COMPANY
BOISE, IDAHO.

SETTLER'S AGREEMENT—CAREY ACT

This Agreement, Made in duplicate this_____ between the Big Lost River Irrigation Company, a corporation organized and existing under the laws of the State of Idaho, party of the first part (for convenience hereinafter called "the company"), and

(for convenience hereinafter called "the purchaser"), of_____

State of_____, party of the second part,
WITNESSETH:

That heretofore, to-wit, on May 27th, 1909, George S. Speer entered into a contract with the State of Idaho, acting by its State Board of Land Commissioners, whereby he bound himself to construct a system of canals, reservoir and irrigation works for the reclamation and irrigation of certain lands therein described and referred to, which said contract has been regularly and duly assigned to the Big Lost River Irrigation Company aforesaid and which contract and the assignment thereof is on file and of record in the office of the Register of the State Board of Land Commissioners of the State of Idaho, at Boise, Idaho.

That the company and its predecessor in interest

has heretofore entered upon and is now engaged in the work of constructing said canals, reservoir and irrigation works for the purpose of storing and diverting from Big Lost River and Antelope Creek waters thereof under the several appropriations heretofore made for that purpose; said appropriations being evidenced by Permits Nos. 1507, 1513, 1748, 4061, 4062 and 4063 issued by the State Engineer of the State of Idaho.

That the said State Board of Land Commissioners, pursuant to law and its rules and regulations, has notified first party that it may proceed to sell or contract rights to the use of water flowing and to flow through the said canals and irrigation works and rights to and in said system of irrigation works, pursuant to law and the terms of said contract with the State.

That the purchaser has made application to first party to be permitted to purchase, upon the terms hereinafter set forth, the rights and privileges by said contract guaranteed to the extent hereinafter named; which said application is hereby accepted by said first party subject to the approval of the State Board of Land Commissioners, whose approval, previous to the delivery thereof, has been, by its Register, endorsed hereon.

That, in consideration of the sum of ONE HUNDRED AND SIXTY DOLLARS (\$160.00), cash in hand paid this day by the purchaser to first party and in consideration of the covenants and agreements hereinafter contained, the purchaser hereby purchases water rights, mentioned in said contract

between said George S. Speer and the State of Idaho and subject to the terms of said contract, for the land hereinafter described to the extent of one-eightieth (1-80) of a cubic foot of water per second of time for each acre of such land.

In further performance of said contract with the State of Idaho, there is herewith issued to said purchaser Certificate No. ———, for Forty (40) shares of the capital stock of Lost River Water Company in form as follows, to wit:

Incorporated Under the Laws of the State of Idaho.
Number ———. 40 Shares.

LOST RIVER WATER COMPANY.

This is to certify that —————
is the owner of Forty (40) shares of the capital stock of Lost River Water Company, transferable on the books of the company by endorsement hereon.

Said owner has purchased and is entitled to the use of one-eightieth (1-80) of a cubic foot of water per second of time per acre for the irrigation of and domestic uses on the following described lands:

—————
Section ———, Township ——— North, of Range
————— East, Boise Meridian, in the County of
—————, and State of Idaho.

This certificate entitles the owner hereof when the purchase price of the water rights hereinbefore referred to shall have been fully paid to a proportionate interest in the dam, canal, reservoir, water rights, irrigation works and other rights and franchises of Lost River Water Company, based upon the number of shares of stock finally issued to pur-

chasers of water rights in accordance with the contract between George S. Speer and the State of Idaho, dated May 27th, 1909, and heretofore assigned to the Big Lost River Irrigation Company.

IN WITNESS WHEREOF, the Lost River Water Company has caused this certificate to be sealed with its corporate seal and signed by its duly authorized officers this — day of —, 19—.

LOST RIVER WATER COMPANY.

By _____,
President.

Attest: _____,

Secretary.

The water which the purchaser shall have the right to use on account of said purchase of water rights shall be used upon and such water and water rights shall become dedicated and be appurtenant to the following described land and no other, to-wit:—

in Section —, of Township — North, of Range — East, Boise Meridian, containing Forty (40) acres in — County, Idaho.

And the parties hereto expressly agree, as follows, to wit:

1. This agreement is made in accordance with the provisions of said contract between the State of Idaho and George S. Speer and assigned to first party, which, together with the laws of the State of Idaho, shall be regarded as defining the rights of the respective parties hereto.

2. The company agrees that so long as it retains control of Lost River Water Company, to-wit, so

long as it shall continue to vote a majority of the stock of said company as provided by said contract with the state, it will cause said company to keep and maintain the said irrigation system in good order and condition and cause any necessary repairs thereto to be made as soon as practicable and expedient.

Said Lost River Water Company is to have the power to levy and collect all necessary tolls, charges and assessments upon and from all purchasers of water rights, or their assigns, in proportion to their respective purchases or ownership of water rights, whether water is used or not, and the first party hereby agrees that no charges shall be made for the delivery of water from this date until the first day of May, 1910, and that, thereafter, the annual charge for maintenance shall not, while first party is in control of said Lost River Water Company, exceed the sum of fifty (50c) cents for each and every acre, to be charged against the entire acreage entered or for which water rights have been purchased irrespective of the irrigation thereof. The purchaser agrees to pay said charges at the rate of fifty (50c) cents *cents* per acre in advance at the office of Lost River Water Company on the first day of May of each year, without notice, if water is available for use for said year. But in case said Lost River Water Company shall estimate and fix said charges for any year at a less sum than fifty (50c) cents, such estimate to be made before the first day of May of such year, payment shall be made as aforesaid at the rate of such less sum per acre.

3. The purchase price of the water rights hereby purchased is the sum of ONE THOUSAND SIX HUNDRED DOLLARS (\$1600.00), and the balance thereof remaining due after the cash payment hereinbefore acknowledged, to-wit: The sum of ONE THOUSAND FOUR HUNDRED AND FORTY DOLLARS (\$1440.00), is due and payable as follows, to-wit:

	Due.	Principal.	Interest.	Amount.
1st Deferred Payment...	October 1st, 1910	\$80.00	\$36.00	\$116.00
2nd Deferred Payment...	October 1st, 1911	80.00	81.60	161.60
3rd Deferred Payment...	October 1st, 1912	120.00	76.80	196.80
4th Deferred Payment...	October 1st, 1913	120.00	69.60	189.60
5th Deferred Payment...	October 1st, 1914	120.00	62.40	182.40
6th Deferred Payment...	October 1st, 1915	120.00	55.20	175.20
7th Deferred Payment...	October 1st, 1916	160.00	48.00	208.00
8th Deferred Payment...	October 1st, 1917	160.00	38.40	198.40
9th Deferred Payment...	October 1st, 1918	160.00	28.80	188.80
10th Deferred Payment...	October 1st, 1919	160.00	19.20	179.20
11th Deferred Payment...	October 1st, 1920	160.00	9.60	169.60

Interest from May 1, 1910, at 6 per cent. per annum may be charged if water is available from said reservoir and canal for use during the irrigation season of 1910, and if not available for said season, interest shall commence when such water is available. But it is further understood and agreed that no payment other than the initial payment, and no interest shall be required to be paid under this contract until the water is available for distribution from said reservoir and canals at a point within one-half (1-2) mile of each legal subdivision of one hundred sixty acres, and such water must be available May first in order to make such payments become due, and all payments and interest provided in this contract shall be advanced in time according to the

delay in the delivery of the said water as aforesaid.

4. The purchaser hereby covenants and agrees that, upon default in the payment of any of the deferred payments above specified or of the interest thereon or of any annual charge, toll or assessment, as above mentioned, first party, its representatives or assigns, may declare the entire amount of the principal purchase price for said water rights due and may proceed, either in law or equity, to collect the same and to enforce any lien which it may have on the water rights hereby contracted to be sold or upon the land to which said water rights are dedicated as aforesaid, or may, at its option, proceed to enforce any remedy given by the laws of the State of Idaho to first party against the purchaser, and the purchaser further covenants that he will, and by these presents, does hereby assign, transfer and set over by way of mortgage or pledge to the first party to secure the payment of the amounts due and to become due on the purchase price of the water rights hereby purchased and all interest herein provided for, any and all right, title and interest in and to the lands above described which he now has or which may hereafter accrue to him under his contract with the State of Idaho or from any other source and, further, that, immediately upon transfer to him from the State of Idaho or the United States, of the legal title to the said lands or any part thereof, he will, upon demand of first party or its assigns, execute in proper form a mortgage or deed of trust with power of sale to secure the payments herein provided for; which said mortgage, the purchaser

hereby covenants and agrees shall be a first lien upon the lands so mortgaged superior to any and every incumbrance in favor of any person or persons whomsoever.

5. The purchaser agrees that, to further secure said payments, the said shares of stock in said Lost River Water Company shall be and they are hereby assigned and transferred to the first party with power to pledge the same, and said first party, its agents and assigns, are hereby authorized and empowered to vote said stock in such manner as it may deem proper at all meetings of the stockholders of said company until thirty-five (35%) per cent. of the purchase price, as hereinbefore set out, of water rights hereby purchased has been paid.

6. It is agreed that no water shall be delivered for use on the lands above described from said irrigation system while any installment of principal or interest above mentioned is due and unpaid or while any toll or assessment is due and unpaid to Lost River Water Company.

7. This contract may be assigned or pledged by first party and thereupon the payment of principal and interest, unless otherwise provided in such assignment or pledge, shall be due and payable to the assignee or pledgee, but the payment of tolls, assessments and charges for the delivery of water as aforesaid shall, unless otherwise provided, be paid to Lost River Water Company, and payments thereof may be enforced by it. [494]

8. This contract is made pursuant to and subject to the contract, above mentioned, between said

George S. Speer and the State of Idaho and under existing laws of said State and is to be construed in conformity with said contract and said laws.

9. All notices given to said purchaser by the State Board of Land Commissioners or by first party may be sent to said purchaser by mail addressed to his address first hereinbefore given.

10. No provisions hereof shall impair or affect the rights or remedies of the first party or its assigns under any statute of the United States or of the State of Idaho.

IN WITNESS WHEREOF, The parties have hereunto subscribed their names, and the company has caused its seal to be affixed, the day and year above written, in duplicate.

BIG LOST RIVER IRRIGATION COMPANY,

By _____,
President.

_____,
Purchaser.

By _____,
Attorney in Fact.

Attest: _____,
Assistant Secretary.

STATE OF IDAHO,

County of _____, —ss.

On this — day of _____, in the year 19—, before me, _____, a Notary Public in and for said State and County, personally appeared _____, known to me to be the person whose name is subscribed to the above instrument and acknowledged to me that he executed the same.

Witness my hand and official seal the day and year in this certificate first above written.

_____,
Notary Public.

STATE OF IDAHO,

County of _____, —ss.

On this ____ day of _____, in the year 19____, before me, _____, a Notary Public in and for said State and County, personally appeared _____, known to me to be the person whose name is subscribed to the above instrument as the attorney in fact of _____, and acknowledged to me that he subscribed the name of _____ thereto as principal and his own name as attorney in fact.

Witness my hand and official seal the day and year in this certificate first above written.

_____,
Notary Public.

STATE OF IDAHO,

County of _____, —ss.

On this ____ day of _____, 19____, before me, _____, a Notary Public in and for the State and County aforesaid, personally appeared _____, known to me to be the President *Secretary* of the corporation that executed the foregoing instrument and acknowledged to me that such corporation executed the same.

WITNESS my hand and official seal the day and year in this certificate first above written.

_____,
Notary Public.

The foregoing contract is hereby approved, and
has been registered this — day of —, 19—. **STATE BOARD OF LAND COMMISSIONERS.**

By _____,
Register.

Boise, Idaho, —, 19—.

For value received this contract, principal and interest, is hereby assigned and transferred to

_____ by authority of a resolution of the Board of Directors of Big Lost River Irrigation Company.

BIG LOST RIVER IRRIGATION COMPANY.

By _____,
President.

Attest: _____,
Assistant Secretary.
No. —.

Dated _____

CONTRACT
Big Lost River Irrigation Company
WITH

Reception No. —.

State of Idaho,
County of —, —ss.

I hereby certify that this instrument was filed for record at the request of Big Lost River Irrigation Company, at — o'clock — M., this — day of

vs. Corey Bros. Construction Company et al. 569

_____, 19____, in my office, and duly recorded in
book _____ of Water Contracts at page _____.

_____,
Ex-Officio Recorder.

By _____,
Deputy.

Fees, \$_____.

No. 340. Filed Apr. 25, 1912. A. L. Richardson,
Clerk. [495]

Defendants' Exhibit No. 80.

CERTIFICATE OF CERTIFIED COPY.

STATE OF IDAHO.

DEPARTMENT OF STATE.

I, WILFRED L. GIFFORD, Secretary of State
of the State of Idaho, do hereby certify that the
annexed is a full, true and complete transcript of a
Certified Copy of the Articles of Incorporation of
the

LOST RIVER WATER COMPANY.

which was filed in this office on the First day of Sep-
tember, A. D. 1909, and admitted to record.

In Testimony Whereof, I have hereunto set my
hand, and affixed the Great Seal of the State. Done
at Boise City the Capital of Idaho, this Twelfth day
of April, in the year of our Lord one thousand nine
hundred and Twelve, and of the Independence of the
United States of America the One Hundred and
Thirty-sixth.

[Seal]

WILFRED L. GIFFORD,
Secretary of State. [496]

ARTICLES OF INCORPORATION
OF THE

LOST RIVER WATER COMPANY.

KNOW ALL MEN BY THESE PRESENTS:

THAT, WHEREAS, under the provisions of an Act of Congress approved August 16, 1894, commonly known as the "Carey Act," as amended, and pursuant to the laws of the State of Idaho and the rules and regulations of the State Board of Land Commissioners, one George S. Speer, on May 27th, 1909, entered into a contract with said State for the reclamation of certain lands situated in the counties of Blaine, Bingham and Fremont, in said State, and

WHEREAS, the said George S. Speer has sold and assigned all his right, title and interest in, to and under said contract and in the irrigation system and works therein provided to be constructed, together with all rights, franchises and privileges and all lands, water rights, rights of way, dams, reservoirs, main and lateral canals, constructed and to be constructed, and any and everything pertaining to and connected with said irrigation system to the Big Lost River Irrigation Company, a corporation organized under the laws of the State of Idaho, which corporation has succeeded to all the rights and privileges and has assumed all the obligations of said George S. Speer under his said contract with the State, and

WHEREAS, it is now proposed, pursuant to said contract with the State, to organize a corporation for the operation and management of the irrigation system to be constructed under said contract referred to;

NOW, THEREFORE, the undersigned have vol-

untarily associated themselves together to form a corporation under the laws [497] of the State of Idaho, and do hereby certify:

FIRST.

That the name of said corporation is LOST RIVER WATER COMPANY.

SECOND.

That the purpose for which said corporation is formed is;

1. To provide a method of transferring the ownership, control and management of the reservoirs, canals, irrigation system and works to be constructed by said Big Lost River Irrigation Company, its successors or assigns, and all water rights, rights of way, franchises and privileges pertaining thereto and connected therewith, as the said irrigation system and works shall be completed and turned over by said Big Lost River Irrigation Company, its successors or assigns, to this corporation; to determine the rights of said purchasers of shares and water rights as between themselves and between said purchasers and the said Big Lost River Irrigation Company, its successors or assigns; to operate and maintain said irrigation system and works as the same shall be completed and turned over to it during the period of construction and subsequent thereto; to levy and collect tolls, charges and assessments for the carrying on and maintaining of said irrigation system, and the management and operation thereof.

2. As the same shall be completed and turned over to it for operation by the said Big Lost River Irrigation Company, its successors or assigns, to dis-

tribute the waters of said irrigation system, among its stockholders; to maintain, operate and keep in repair said irrigation works; to fix, charge and collect from its stockholders, and all users of water from the said irrigation system, tolls, rentals, assessments and maintenance charges, based upon the number of shares of stock held by each person herein, or proportionate to the amount of water owned, or used, or the number of acres irrigated, or by any one, or more, or all of such methods, and to impose and collect fines and penalties for failure of its [498] stockholders, or water users, to pay the tolls, rentals, assessments or maintenance charges when due.

3. To acquire by purchase, lease or otherwise, to own, hold, sell, lease or otherwise dispose of such real and personal property or rights or interest therein, as may be necessary in transacting the business of this corporation.

THIRD.

That the place where the principal office of the company shall be located and where its principal business is to be transacted is Boise, Ada County, Idaho.

FOURTH.

That the term for which it is to exist is Fifty (50) years from and after the date of incorporation.

FIFTH.

That the number of directors of the company shall be five (5).

SIXTH.

That the amount of the authorized capital stock of the corporation shall be one hundred thousand

(\$100,000) dollars divided into one hundred thousand (100,000) shares with par value of one (\$1) dollar each.

SEVENTH.

That the amount of said capital stock actually subscribed, the names of the persons by whom the same has been subscribed and their residences are as follows:

Name.	Residence.	No. of Shares.
C. B. Hurtt,	Boise, Idaho	3
Louis N. Roos,	Boise, Idaho	1
B. W. Oppenheim,	Boise, Idaho	1
S. C. Champlain,	Boise, Idaho	1
N. M. Ruick,	Boise, Idaho	1

[499]

IN WITNESS WHEREOF, we have hereunto set our hands and seals this 1st day of September, 1909.

C. B. HURTT. (Seal)

LOUIS N. ROOS. (Seal)

B. W. OPPENHEIM. (Seal)

S. S. CHAMPLAIN. (Seal)

N. M. RUICK. (Seal)

[500]

State of Idaho,
County of Ada,—ss.

On this 1st day of September, 1909, before me, Frances E. Walker, a Notary Public in and for said state and county, personally appeared C. B. Hurtt, Louis N. Roos, B. W. Oppenheim, S. S. Champlain and N. M. Ruick, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal the day and year in this certificate first above written.

(Notarial Seal) FRANCES E. WALKER,
Notary Public.

My Commission expires June 26, 1913.

State of Idaho,
County of Ada,—ss.

CERTIFICATE.

I, W. L. Cuddy, Ex-Officio Recorder in and for Ada County, State of Idaho, do hereby certify that the annexed is a full, true and correct copy of certain Articles of Incorporation of the LOST RIVER WATER COMPANY, Numbered 1224 as the same appears on file in my office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official Seal this 1st day of Sept., A. D. 1909.

(Seal) W. L. CUDDY,
Ex-Officio Recorder.
By Otto F. Peterson,
Deputy. [501]

ENDORSED. Copy 1224. 6491.

Certified Copy of the Articles of Incorporation of the
LOST RIVER WATER COMPANY.

Dated ———, 1909.

State of Idaho,
County of Ada,—ss.

I hereby certify that this instrument filed for record at request of B. W. Oppenheim at 1 minute past 3 o'clock P. M., this 1st day of Sept., A. D. 1909, in

vs. Corey Bros. Construction Company et al. 575
my office and duly recorded in book — of — at
page —.

W. L. CUDDY,
Ex-officio Recorder.
By Otto F. Peterson,
Deputy.

Fees \$——.
DEPARTMENT OF STATE,
Secretary's Office.

Filed this 1st day of Sept., 1909, at 3:30 o'clock
P. M., and Recorded in Book Z of Dom. Corpns. on
page 438.

Records of the State of Idaho.

ROBERT LANSDON,
Secretary of State.
\$45.00.

Filed April 25, 1912. A. L. Richardson, Clerk.
[502]

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of First Meeting of Incorporators.

The first meeting of the incorporators of the Big
Lost River Irrigation Company was held on the 16th
day of July, 1909, at 11 o'clock A. M. at the office
of the company in Boise, Idaho, pursuant to a writ-
ten Waiver of Notice signed by all of the incorpo-
rators fixing said time and place.

The following incorporators were present in per-
son:

Name	Residence.	No. of Shares.
J. E. Clinton, Jr.,	Boise, Idaho.	1
C. B. Hurtt,	Boise, Idaho.	3
A. McPherson,	Twin Falls, Idaho.	1
N. M. Ruick,	Boise, Idaho.	1

On motion, Mr. C. B. Hurtt was elected chairman and Mr. N. M. Ruick was appointed Secretary of the meeting.

The Secretary reported that the Articles of Incorporation of the Company were filed in the office of the Recorder of Ada County, State of Idaho, on the 15th day of June, 1909, and on the same date a copy thereof, duly certified, was filed in the office of the Secretary of State of said State of Idaho, and the Secretary presented to the meeting a certified copy of said Articles of Incorporation.

The Secretary presented and read the Waiver of Notice of meeting, which was approved and ordered spread upon the minutes as follows:

“Big Lost River Irrigation Company.”

Waiver of notice of meeting of incorporators.

We, the undersigned, the incorporators and stockholders of the Big Lost River Irrigation Company, a corporation organized and existing under the laws of the State of Idaho, hereby waive notice of the time, place and purpose of the first meeting of the corporation and fix the 16th day of July, 1909, at 11 o'clock A. M. as the time and the office of the company in the City of [503] Boise, county of Ada, state of Idaho, as the place of said meeting and we do hereby waive all requirements of the statutes of Idaho as to the notice of this meeting and publication thereof and consent to the transaction of such business as

may come before said meeting.

Dated Boise, Idaho, July 16, 1909.

J. E. CLINTON, Jr.,
C. B. HURTT,
ALEX McPHERSON,
A. L. TUCKER,
B. W. OPPENHEIM,
N. M. RUICK,
LOUIS N. ROOS,

Stockholders and Incorporators.

The Secretary presented the following transfers of subscription:

One (1) share of stock from C. B. Hurtt to Louis N. Roos and one (1) share of stock from A. L. Tucker to B. W. Oppenheim.

On motion duly made and seconded, such transfers were approved and ordered filed.

The election of directors being in order, Messrs. McPherson and Ruick were appointed tellers and a vote by ballot being taken resulted as follows:

Name.	Residence.	No. of Shares.
J. E. Clinton, Jr.,	Boise, Idaho.	6
C. B. Hurtt,	Boise, Idaho.	6
Louis N. Roos,	Boise, Idaho.	6
B. W. Oppenheim,	Boise, Idaho.	6
N. M. Ruick,	Boise, Idaho.	6

The said five persons above named, having received the vote of a majority of the shares of the subscribed capital stock of said corporation, were declared duly elected directors to hold their offices until the next annual meeting for the election of directors and until their successors are elected and qualify.

The Secretary of the meeting presented a form of By-Laws for the regulation of the affairs of the company which were read article by article and adopted by the vote and assent of four-fifths ($\frac{4}{5}$), comprising six (6) shares out of a total of seven [504] (7) shares, of the subscribed capital stock of said corporation and the Secretary of the corporation was directed to copy such By-Laws, duly certified, in a book to be kept in the principal office of said corporation in this state to be known as the "Book of By-laws" of the Big Lost River Irrigation Company.

The following resolution was read:

Resolved that the Board of Directors are hereby empowered to repeal and amend the by-laws of this corporation and to adopt new by-laws at any regular meeting of said board or at a special meeting called for that purpose. A vote being taken on the question of the adoption of said resolution, (Corporate Seal.) the same was adopted by the vote of the holders of all of the subscribed capital stock of the corporation present at said meeting.

Upon motion duly recorded, it was

Resolved that the seal, an impression of which is hereunto affixed, be adopted as the corporate seal of the corporation.

A form of stock certificate was presented and, upon motion duly made and seconded, was adopted.

Upon motion duly made and seconded and by the affirmative vote of all present constituting the holders of four-fifths of the subscribed capital stock of said corporation, the following preambles and

resolutions were adopted.

Whereas, George S. Speer has offered to sell to this Company property as follows:

Boise, Idaho, July 12, 1909.

To the Board of Directors,

Big Lost River Irrigation Company,

Boise, Idaho.

Gentlemen:—

I hereby offer to sell to your company the Big Lost River Irrigation Project for the reclamation of approximately [505] one hundred thousand (100,000) acres of land under the Carey Act in the counties of Custer, Blaine, Bingham and Fremont in the State of Idaho, together with all property, real and personal water rights, rights of way for reservoirs and canals and any and all property, rights, privileges and franchises pertaining to or connected with the said irrigation project and to assign to your company in my contract with the State of Idaho executed and dated May 27th, 1909, for the reclamation of said lands:—all for the sum of nine hundred ninety-nine thousand three hundred (\$999,300.) dollars payable in full paid shares of the capital stock of your company at their par or face value.

There is attached hereto as a part of this proposal "Schedule A" containing a reference to the water rights and rights of way connected with said project; also "Schedule B" containing a list of obligations heretofore assumed by me in connection with said project, which liabilities and obligations your com-

pany is to assume as an additional consideration for the sale and transfer of said irrigation project.

Respectfully,

GEORGE S. SPEER.

And Whereas, it appears to the stockholders that such property is necessary for the business of this company and that the same is of the value of nine hundred ninety-nine thousand three hundred (\$999,300.) dollars.

Now, Therefore, be it

Resolved that the Board of Directors of this company be and they are hereby authorized and recommended to purchase the said property above mentioned for the said price and to issue and deliver to said George S. Speer full paid stock of the company to the amount of nine hundred ninety-nine thousand three hundred (\$999,300.) dollars in payment therefor. [506]

No further business was presented, and on motion the meeting adjourned.

N. M. RUICK,
Secretary.

Approved:

C. B. HURTT,
Chairman.

BIG LOST RIVER IRRIGATION COMPANY.

Consent of Stockholders on the Record.

We, the undersigned, constituting the incorporators and all the stockholders of the Big Lost River Irrigation Company, a corporation, organized and existing under the laws of the State of Idaho,

having been present at a meeting of the stockholders of said company held at the office of the company in the City of Boise, State of Idaho, on the 16th day of July, 1909, at 11 o'clock A. M., do hereby, on the record of such meeting, sign the written consent thereto; and we do hereby severally ratify and confirm any and all acts, doings and proceedings of such meeting, and particularly the transfers of stock by C. B. Hurtt to Louis N. Roos and by A. L. Tucker to B. W. Oppenheim, one (1) share each; the election of C. B. Hurtt, Louis N. Roos, J. E. Clinton, Jr., B. W. Oppenheim and N. M. Ruick, as directors of said company; the adoption of by-laws for the regulation of the affairs of the company in the form presented to and adopted by said meeting: entending authority to the Board of Directors to repeal and amend the By-laws of the corporation and to adopt new By-laws of the corporation and to adopt new By-laws at any regular meeting of said board or at a special meeting called for that purpose; adopting a seal for said corporation; adopting a form of stock certificate; accepting the offer of George S. Speer to convey to [507] said company, for a consideration of nine hundred ninety-nine thousand three hundred (\$999,300) Dollars in the full paid capital stock of this company, the Big Lost River Irrigation Project, so called, and the action taken fixing the value thereof at the sum stated and the resolution authorized and recommending to the board of directors of the company the purchase of said property at the price stated and the issuing and delivery of

stock in payment therefor.

Signed on the record this 16th day of July, 1909.

J. E. CLINTON, Jr.,
C. B. HURTT,
ALEX. McPHERSON,
N. M. RUICK,
B. W. OPPENHEIM,
LOUIS N. ROOS,
A. L. TUCKER,

Incorporators and Stockholders.

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of First Meeting of Directors.

The first meeting of the Board of Directors of the Big Lost River Irrigation Company was held at the office of the company in the City of Boise, State of Idaho, on the 16th day of July, 1909, at 11:30 o'clock in the forenoon.

Present, Messrs. C. B. Hurtt, Louis N. Roos, J. E. Clinton, Jr., B. W. Oppenheim and N. M. Ruick, constituting the entire membership of the board.

Mr. C. B. Hurtt was chosen temporary chairman and Mr. B. W. Oppenheim was appointed temporary Secretary of the meeting.

The Secretary presented and read a Waiver of Notice of the meeting signed by all the directors and the same was ordered filed and spread upon the minutes, as follows:

Big Lost River Irrigation Company,
Waiver of Notice of First Meeting of Board of
Directors.

We, the undersigned, directors of the Big Lost River [508] Irrigation Company, a corporation

organized and existing under the laws of the State of Idaho, hereby waive notice of the time and place of first meeting of the board of directors and of the business to be transacted at said meeting. We designate the 16th day of July, 1909, at 11:30 o'clock in the forenoon as the time and the office of the company in the city of Boise as the place of said meeting, the purpose of said meeting being the election of officers, the authorization of the issue of stock of the company, the authorization of the purchase of the Big Lost River Carey Act Irrigation Project pursuant to a proposal and offer made by George S. Speer and the payment therefor in the stock of this company, the purchase of any property necessary for the business of the company and the transaction of such other business as the board may deem proper.

Dated, Boise, Idaho, July 16, 1909.

C. B. HURTT,
J. E. CLINTON, Jr.,
N. M. RUICK,
B. W. OPPENHEIM,
LOUIS N. ROOS,

Directors.

The minutes of the first meeting of the incorporators were read.

The following gentlemen were unanimously chosen officers of the company to serve until the next annual meeting for the election of directors of the company

and until their successors are chosen and qualify:

President, C. B. Hurtt.

Vice-President, N. M. Ruick.

Secretary, B. W. Oppenheim.

Treasurer, E. C. Stoddard.

The President thereupon took the chair.

(Corporate Seal.) Upon motion duly made and seconded,
it was

Resolved that a seal according to the design presented at this meeting, an impression of which is directed to be made in the margin of the minute book, be and the same is hereby adopted [509] as the seal of the corporation.

Upon motion duly made and seconded, it was

Resolved that the President and the Secretary be and they are hereby authorized to have engraved and printed and to issue certificates of stock in the form submitted at this meeting.

Upon motion duly made and seconded, it was

Resolved that Messrs. C. B. Hurtt, and J. E. Clinton, Jr., and N. M. Ruick, be and they are hereby designated members of the executive committee (Mr. Hurtt to be chairman thereof), with authority to exercise all the powers of the board in the current business of the company while the board is not in session.

The Secretary was directed to procure proper books for the corporation.

The proposition of George S. Speer to sell, transfer and assign to the company the Big Lost River Irrigation Project and to assign to the company his

contract with the State of Idaho was read and ordered spread upon the minutes as follows:

Boise, Idaho, July 12, 1909.

To the Board of Directors,

Big Lost River Irrigation Company,

Boise, Idaho.

Gentlemen:—

I hereby offer to sell to your company the Big Lost River Irrigation Project for the reclamation of approximately one hundred thousand (100,000) acres of land under the Carey Act in the counties of Custer, Blaine, Bingham and Fremont in the State of Idaho, together with all property, real and personal water rights, rights of way for reservoirs and canals and any and all property, rights, privileges, and franchises pertaining to or connected with the said irrigation project and to assign to your company my contract with the State of Idaho, executed and dated May 27, 1909, for the reclamation of said lands:—
[510] all for the sum of nine hundred ninety-nine thousand three hundred (\$999,300) dollars payable in full paid shares of the capital stock of your company at their par or face value.

There is attached hereto as a part of this proposal "Schedule A" containing a reference to the water rights and rights of way connected with said project; also "Schedule B" containing a list of obligations heretofore assumed by me in connection with said project, which liabilities and obligations your company is to assume as an additional consideration for

the sale and transfer of said irrigation project.

Respectfully,

GEORGE S. SPEER.

Upon motion duly made and seconded, it was

Resolved that the company accept the offer of George S. Speer to sell, transfer and assign the Big Lost River Irrigation Project, together with his contract with the State of Idaho, dated May 27, 1909, referred to in the resolution of the stockholders passed at the first meeting of the corporation authorizing the purchase, and as hereinbefore described in these minutes, and the Board of Directors do hereby adjudge and declare that said property is of the fair value of nine hundred ninety-nine thousand three hundred (\$999,300) dollars and that the same is necessary for the business of this company.

Further Resolved that the President and the Secretary be and they are hereby authorized and directed to issue to the order of said George S. Speer certificates of full paid capital stock of this company to the aggregate amount of nine hundred ninety-nine thousand three hundred (\$999,300) dollars as consideration for the sale, transfer and assignment to this company of the property referred to in the offer heretofore made by him which resolution was unanimously adopted. [511]

No further business was presented, and on motion the meeting adjourned.

B. W. OPPENHEIM,
Secretary.

Approved:

C. B. HURTT,
Chairman.

BIG LOST RIVER IRRIGATION COMPANY.
Minutes of Special Meeting of Board of Directors.
August 21, 1909.

A special meeting of the Board of Directors of the Big Lost River Irrigation Company, was held at the office of the company in the City of Boise, State of Idaho, on the 21st day of August, 1909, at 10:30 o'clock in the forenoon.

Present, Messrs. N. M. Ruick, Louis N. Roos, and B. W. Oppenheim, constituting a majority of the membership of said board.

In the absence of the President, Mr. C. B. Hurtt, the Vice-President, Mr. N. M. Ruick, acted as chairman and the Secretary Mr. B. W. Oppenheim, acted as Secretary of the meeting.

The Secretary presented and read a Waiver of Notice of the meeting signed by all the directors and the same was ordered filed and spread upon the minutes as follows:

Waiver of Notice of Meeting of Board of Directors.

We, the undersigned, directors of the Big Lost River Irrigation Company, a corporation organized and existing under the laws of the State of Idaho, hereby waive notice of the time, place and purpose of the meeting of the board of directors and of the

business to be transacted at said meeting and fix Saturday, [512] August 21st, 1909, at 10:30 o'clock A. M., as the time and the office of the company in the city of Boise, county of Ada, State of Idaho, as the place of said meeting. The purpose of said meeting being:

(1) Authorizing the execution, in its behalf, by the officers of the company of a contract with Corey Bros. for the construction of the irrigation works of the company on Big Lost River in Blaine and Custer Counties.

(2) Authorizing the company to borrow money to the present amount of two million (\$2,000,000.00) dollars and to issue its negotiable bonds therefor and authorizing and directing the proper officers of the company to execute, under the corporate seal, said bonds and a mortgage or deed of trust to secure the same.

(3) Transacting any other business that may be brought before said meeting.

Dated, Boise, Idaho, August 10, 1909.

J. E. CLINTON, Jr.,
LOUIS N. ROOS,
B. W. OPPENHEIM,
C. B. HURTT,
N. M. RUICK,

Directors.

The minutes of the first meeting of directors were read and approved.

The following resolution offered by Director Louis N. Roos was duly adopted.

Resolved that this company procure a loan in the

present amount of two million (\$2,000,000.00) dollars and issue its negotiable bonds therefor in the amount stated, said bonds to be dated July 1st, 1909, to bear interest at the rate of six (6%) per cent. per annum, payable semi-annually, both principal and interest payable in gold coin of present standard, said bonds to be of the denominations of \$1,000, \$500 and \$100 respectively and maturing serially as follows, to-wit: \$150,000 in amount thereof [513] on January 1st, 1915; \$200,000 in amount thereof on January 1st in each of the years 1916, 1917 and 1918; and \$250,000 in amount thereof on January 1st in each year beginning with the year 1919 and ending with the year 1923; that the president and secretary of the company be and they are hereby authorized and directed to execute under the corporate seal of the company said bonds and a mortgage or deed of trust securing the same on any or all of the property, real or personal, of this company and especially the property known as the Big Lost River Irrigation system and all rights of the company in connection therewith and all contracts executed by the company relating thereto, which mortgage or deed of trust shall run to the American Trust and Savings Bank and Frank H. Jones, both of Chicago, Illinois, as trustees, said mortgage or deed of trust to be substantially in the form of a draft thereof now presented to this board with this resolution; said bonds when properly executed to be delivered to the said trustees for certification and disposal in accordance with the terms of the deed of trust hereinbefore referred to.

The Secretary offered the following resolution which was duly adopted by the Board:

Resolved that the officers of the company be and they are hereby authorized to execute in behalf of the company a contract with Corey Bros. for the construction of the irrigation works of the company on Big Losr River in Blaine, Custer, Fremont and Bingham Counties in the State of Idaho.

There being no further business before the meeting, the meeting was declared adjourned.

N. M. RUICK,
Acting Chairman.

B. W. OPPENHEIM,
Secretary. [514]

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Special Meeting of Stockholders.

August 21st, 1909.

Minutes of the special meeting of stockholders of the Big Lost River Irrigation Company held at the office of the company at Boise, Idaho, on the 21st day of August, 1909, at 11:00 o'clock A. M., said meeting being held in accordance with the By-laws, all stockholders being present, pursuant to a written consent signed by each of them as follows, to-wit:

BIG LOST RIVER IRRIGATION COMPANY.

Waiver of Notice of Special Meeting of Stockholders, August 21st, 1909.

We, the undersigned, stockholders of the Big Lost River Irrigation Company, hereby consent to the holding of a special meeting of the stockholders of the said company at the office of the company at Boise, Idaho, on the 21st day of August, 1909, at the

hour of 11:00 o'clock A. M., for the purpose, among others, of considering, authorizing, ratifying and approving the execution of a mortgage or deed of trust and bonds of the company.

G. S. SPEER,
C. B. HURTT,
LOUIS N. ROOS,
B. W. OPPENHEIM,
J. E. CLINTON, Jr.,
N. M. RUICK,

Stockholders.

In the absence of the President, Mr. N. M. Ruick, Vice-President of the company, called the meeting to order the Secretary, Mr. B. W. Oppenheim, acting as Secretary of the meeting.

Mr. Louis N. Roos thereupon offered the following resolution and moved its adoption:

Whereas, the Board of Directors of this company did at a meeting held on the 21st day of August, A. D. 1909, at the office of the company at Boise, Idaho, adopt a resolution providing for [515] the issuance of bonds of the company of which Two Million (\$2,000,000.00) dollars in amount are to be presently executed and issued; said bonds to be dated July 1st, 1909, to bear interest at the rate of six (6%) per cent per annum payable semi-annually, both principal and interest payable in gold coin of present standard; said bonds being of the denomination of \$1000, \$500 and \$100, and maturing serially as follows, to-wit: \$150,000 in amount thereof on January 1st, 1915; \$200,000 in amount thereof on January 1st in each of the years, 1916, 1917 and 1918; and

\$250,000 in amount thereof on the first day of January in each year beginning with the year 1919, and ending with the year 1923; and said resolution further providing for the giving of a mortgage or deed of trust, securing the payment of said bonds, on any or all of the property, real or personal, of this company, and especially the property known as the Big Lost River Irrigation System and all rights of the company in connection therewith and all contracts executed by the company relating thereto, which mortgage or deed of trust shall run to the American Trust & Savings Bank and Frank H. Jones, both of Chicago, Illinois, as Trustees, and is to be substantially in the form of the draft thereof attached to said resolution of the Board of Directors and which resolution further provides for the disposition of said bonds when issued.

Now, Therefore, be it resolved that the said resolution of the Board of Directors of this company be and the same is hereby ratified, approved and confirmed, and the Board of Directors and Officers of the company are directed, authorized and empowered to carry out the terms of said resolution and from time to time to perform all the covenants and conditions of said bonds and of said mortgage and deed of trust; said resolution together with the resolution of the Board of Directors and the draft of the mortgage or deed of trust therein referred to having been fully and carefully read and considered said resolution was unanimously [516] adopted, all the Stockholders of the company voting in the affirmative.

There being no further business, the meeting adjourned.

B. W. OPPENHEIM,
Secretary.

Approved:

G. S. SPEER,
C. B. HURTT,
LOUIS N. ROOS,
B. W. OPPENHEIM,
J. E. CLINTON, Jr.,
N. M. RUICK.

(Being all of the stockholders of said company.)

BIG LOST RIVER IRRIGATION COMPANY.
Minutes of Special Meeting of Board of Directors.
August 27th, 1909.

A special meeting of the Board of Directors of the Big Lost River Irrigation Company was held at the office of the company in the City of Boise, State of Idaho, on the 27th day of August, 1909, at 10:30 o'clock in the forenoon.

Present, Messrs. C. B. Hurtt, N. M. Ruick, Louis N. Roos, and B. W. Oppenheim, constituting a majority of the membership of said board.

Mr. C. B. Hurtt, the President, acted as Chairman and the Secretary, Mr. B. W. Oppenheim, acted as Secretary of the meeting.

The Secretary presented and read a Waiver of Notice of the meeting signed by all the directors and the same was ordered filed and spread upon the minutes as follows:

Waiver of Notice of Meeting of Board of Directors.

We, the undersigned, directors of the Big Lost River Irrigation Company, a corporation organized and existing under the laws of the State of Idaho, hereby waive notice of the time, place and [517] purpose of the meeting of the board of directors and of the business to be transacted at said meeting and fix August 27th, 1909, at 10:30 o'clock A. M., as the time and the office of the company in the City of Boise, County of Ada, State of Idaho, as the place of said meeting. The purpose of said meeting being:

(1) Authorizing the company to borrow money to the present amount of two million (\$2,000,000) dollars and to issue its negotiable bonds therefor and authorizing and directing the proper officers of the company to execute, under the corporate seal, said bonds and a mortgage or deed of trust to secure the same.

(2) Transacting any other business that may be brought before said meeting.

Dated, Boise, Idaho, August 24th, 1909.

J. E. CLINTON, Jr.,
LOUIS N. ROOSE,
B. W. OPPENHEIM,
C. B. HURTT,
N. M. RUICK,

Directors.

The minutes of the last meeting of directors were read and approved.

The following resolution offered by Director Louis N. Roos, was duly adopted:

Resolved that this company procure a loan in the

present amount of two million (\$2,000,000) dollars and issue its negotiable bonds therefor in the amount stated, said bonds to be dated July 1st, 1909, to bear interest at the rate of six (6%) per cent. per annum, payable semi-annually, both principal and interest payable in gold coin of present standard, said bonds to be of the denominations of \$1,000, \$500 and \$100 respectively and maturing serially as follows, to-wit: \$150,000 in amount thereof on January 1st, in each of the years 1916, 1917 and 1918; and \$250,000 in amount thereof on January 1st in each year beginning with the year 1919 and ending with the year 1923; that the [518] president and secretary of the company be and they are hereby authorized and directed to execute under the corporate seal of the company said bonds and a mortgage or deed of trust securing the same on any or all of the property, real or personal, of this company and especially the property known as the Big Lost River Irrigation system and all rights of the company in connection therewith and all contracts executed by the company relating thereto, which mortgage or deed of trust shall run to the American Trust & Savings Bank and Frank H. Jones, both of Chicago, Illinois, as trustees, said mortgage or deed of trust to be substantially in the form of a draft thereof now presented to this board with this resolution; said bonds when properly executed to be delivered to the said trustees for certification and disposal in accordance with the terms of the deed of trust hereinbefore referred to.

There being no further business before the meeting the meeting adjourned.

Approved:

C. B. HURTT,

Chairman.

B. W. OPPENHEIM,

Secretary.

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Special Meeting of Stockholders.

August 27th, 1909.

Minutes of the special meeting of the stockholders of the Big Lost River Irrigation Company held at the office of the company at Boise, Idaho, on the 27th day of August, 1909, at 11:00 o'clock A. M., said meeting being held in accordance with the By-laws, all stockholders being present, pursuant to a written consent signed by each of them as follows, to-wit:

We, the undersigned, stockholders of the Big Lost River Irrigation Company, hereby consent to the holding of a special [519] meeting of the stockholders of the said company at the office of the company at Boise, Idaho, on the 27th day of August, 1909, at the hour of 11:00 o'clock A. M., for the purpose, among others, of considering, authorizing, ratifying and approving the execution of a proposed mortgage or deed of trust and bonds of the company.

Mr. C. B. Hurtt, President of the company, called the meeting to order, the Secretary, Mr. B. W. Oppenheim, acting as Secretary of the meeting.

Mr. Louis N. Roos, thereupon offered the following resolution and moved its adoption:

Whereas, the Board of Directors of this company

did at a meeting duly held on the 27th day of August, A. D. 1909, at the office of the company at Boise, Idaho, adopt a resolution providing for the issuance of bonds of the company of which Two Million (\$2,000,000) dollars in amount are to be presently executed and issued; said bonds to be dated July 1st, 1909, to bear interest at the rate of six (6%) per cent per annum, payable semi-annually both principal and interest payable in gold coin of present standard; said bonds being of the denominations of \$1,000, \$500 and \$100, and maturing serially as follows to-wit: \$150,000 in amount thereof on January 1st, 1915; \$200,000 in amount thereof on January 1st, in each of the years 1916, 1917 and 1918; and \$250,000 in amount thereof on the first day of January in each year beginning with the year 1919, and ending with the year 1923; and said resolution further providing for the giving of a mortgage or deed of trust, securing the payment of said bonds, on any or all of the property, real or personal of this company, and especially the property known as the Big Lost River Irrigation System and all rights of the company in connection therewith and all contracts executed by the company in connection therewith and all contracts executed by the company relating thereto, which mortgage or deed of trust shall run to the American Trust & Savings Bank and Frank H. Jones, both of Chicago, Illinois, as [520] Trustees, and is to be substantially in the form of the draft thereof attached to said resolution of the Board of Directors and which resolution further provides for the disposition of said bonds when issued.

Now Therefore, be it resolved that the said resolution of the Board of Directors of this company be and the same is hereby ratified, approved and confirmed, and the Board of Directors and Officers of the company are directed, authorized and empowered to carry out the terms of said resolution and from time to time to perform all the covenants and conditions of said bonds and of said mortgage and deed of trust; said resolution together with the resolution of the Board of Directors and the draft of the mortgage or deed of trust therein referred to having been fully and carefully read and considered, said resolution was unanimously adopted, all the Stockholders of the company voting in the affirmative.

There being no further business, the meeting adjourned.

B. W. OPPENHEIM,
Secretary.

Approved:

G. S. SPEER,
C. B. HURTT,
LOUIS N. ROOS,
B. W. OPPENHEIM,
J. E. CLINTON, Jr.,
N. M. RUICK,

(Being all the stockholders of said company.)

[521]

BIG LOST RIVER IRRIGATION COMPANY.
Minutes of Special Meeting of Board of Directors,
August 30, 1909.

Minutes of a special meeting of the Board of Directors of the Big Lost River Irrigation Company,

held at the office of the company at Boise, Idaho, on the 30th day of August, 1909, at the hour of 4 o'clock P. M., said meeting being held in accordance with the By-laws of the company, all the Directors, to-wit: C. B. Hurtt, J. E. Clinton, Jr., Louis N. Roos, B. W. Oppenheim, and N. M. Ruick, being present and taking part in the meeting.

The President, Mr. C. B. Hurtt, called the meeting to order, the Secretary, Mr. B. W. Oppenheim, acting as Secretary of the meeting.

Mr. Roos offered the following Resolution and moved its adoption.

Whereas, it is for the best interests of the Company to presently borrow about the sum of Two Million (\$2,000,000) dollars to provide funds for the completion of the company's Irrigation System, including the purchase of rights of way and other property and to pay the outstanding indebtedness of the company and for other corporate purposes, and it is deemed advisable for said purpose that the Company issue negotiable bonds and give a mortgage or deed of trust on its said Irrigation system and an all of its personal property, notes, contracts and mortgages now owned or hereafter to be acquired or executed by it.

Now, Therefore, be it resolved, that the President and Secretary of the company be and they are hereby directed, authorized and empowered forthwith to execute on behalf of the company bonds of this company to the present amount of Two Million (\$2,000,000) dollars, said bonds to be dated July 1st, 1909, and to be of the denominations of \$1000, \$500

and \$100 each, consisting of 1000 bonds numbered consecutively from 1 to 1000, [522] inclusive, for the sum of \$100 each and 50 bonds numbered consecutively from 1001 to 1050, inclusive, for the sum of \$1,000 each, due January 1st, 1915; 200 bonds numbered consecutively from 1051 to 1250, inclusive, for the sum of \$1,000 each, due January 1st, 1916; 200 bonds numbered consecutively from 1251 to 1450, inclusive, for the sum of \$1,000 each, due January 1st, 1917; 200 bonds numbered consecutively from 1451 to 1650, inclusive, for the sum of \$1,000 each, due January 1st, 1918; 250 bonds numbered consecutively from 1651 to 1900, inclusive, for the sum of \$1,000 each, due January 1st, 1919; 500 bonds numbered consecutively from 1901 to 2400, inclusive, for the sum of \$500 each, due January 1st, 1920; 250 bonds numbered consecutively from 2401 to 2650, inclusive, for the sum of \$1,000 each, due January 1st, 1921; 250 bonds numbered consecutively from 2651 to 2900, inclusive for the sum of \$1,000 each, due January 1st, 1922; 250 bonds numbered consecutively from 2901 to 3150, inclusive, for the sum of \$1,000 each, due January 1st, 1923; said bonds numbered from 1901 to 3150 shall be redeemable at the option of the Company in their reverse numerical order on January 1st, 1910, or on any interest payment date thereafter upon the payment by the Company of the principal thereof, accrued interest and a premium of three (3%) per cent, of the principal; all of said bonds to bear interest at the rate of six (6%) per cent. per annum payable semi-annually and to be in such form and subject to such

terms and conditions as are recited in the mortgage or deed of trust hereto attached and in all respects in compliance with such mortgage or deed of trust; and,

Be it further Resolved that the President and Secretary of this company be and they are hereby directed, authorized and empowered to execute and deliver to The American Trust & Savings Bank and Frank H. Jones, both of Chicago, Illinois, as Trustees, a mortgage or deed of trust in substantially the form hereto [523] attached covering, conveying and mortgaging any or all of the property of this company, real and personal, including all of the water rights, permits and appropriations now owned or hereafter acquired by the company or hereafter acquired or constructed by it in the Counties of Blaine, Custer, Fremont and Bingham, in the State of Idaho, and any or all other property of the company now owned or hereafter owned by it, and said officers and their successors are hereby authorized to carry out on behalf of said company all the provisions of said mortgage or deed of trust and in all respects to comply with the same and each and every part thereof.

Be it Further Resolved, that the officers of the Company are authorized to procure the certification of said bonds by the said trustee by the deposit of contracts or mortgages and notes in accordance with the provisions of said deed of trust and to dispose of said bonds on the best terms obtainable by them.

After careful consideration of the said resolution and of the draft of mortgage or deed of trust therein

referred to, a copy of which is hereto attached, the said resolution was by vote unanimously adopted, all of the directors of the Company voting in the affirmative.

On motion, duly made, seconded and unanimously carried, the action of the President and Secretary of the Company in executing, sealing, acknowledging and delivering, in the name and on behalf of the company, on the 27th day of August, 1909, a mortgage or deed of trust to The American Trust and Savings Bank and Frank H. Jones, Trustees, on all the property, real and personal, rights, franchises, privileges, water rights, rights of way, contracts and other property of the company to secure [524] the bonds of the company in the present amount of two million (\$2,000,000) dollars be and the same is hereby approved, ratified and confirmed as and for the action of the company.

B. W. OPPENHEIM,
Secretary.

Approved:

C. B. HURTT,
J. E. CLINTON, Jr.,
LOUIS N. ROOS,
B. W. OPPENHEIM,
N. M. RUICK,

(Being all of the Directors of said Company.)

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Special Meeting of Stockholders.

August 30th, 1909.

Minutes of the special meeting of stockholders of the Big Lost River Irrigation Company held at the

office of the company at Boise, Idaho, on the 30th day of August, 1909, at 4:30 o'clock, P. M. said meeting being held in accordance with the By-Laws, all stockholders being present, pursuant to a written consent signed by each of them as follows, to wit:

We, the undersigned, stockholders of the Big Lost River Irrigation Company, hereby consent to the holding of a special meeting of the stockholders of the said company at Boise, Idaho, on the 30th day of August, 1909, at the hour of 4:30 o'clock, P. M. for the purpose, among others, of considering, authorizing, ratifying and approving the execution of a proposed mortgage or deed of trust and bonds of the company.

Mr. C. B. Hurtt, President of the company, called the meeting to order, the Secretary, Mr. B. W. Oppenheim, acting as Secretary of the meeting.
[525]

Mr. Louis N. Roos thereupon offered the following resolution and moved its adoption:

Whereas, the Board of Directors of this company did at a meeting duly held on the 30th day of August, A. D. 1909, at the office of the company at Boise, Idaho, adopt a resolution providing for the issuance of bonds of the company of which Two Million (\$2,000,000) dollars in amount are to be presently executed and issued; said bonds to be dated July 1st, 1909, to bear interest at the rate of six (6%) per cent per annum, payable semi-annually, both principal and interest payable in Gold Coin of present standard; said bonds being of the denominations of \$1,000, \$500 and \$100, and maturing serially as fol-

lows, to wit: \$150,000 in amount thereof on January 1st in each of the years 1916, 1917 and 1918; and \$250,000 in amount thereof on the 1st day of January in each year beginning with the year 1919, and ending with the year 1923; and said resolution further providing for the giving of a mortgage or deed of trust, securing the payment of said bonds, on any or all of the property, real or personal, of this company, and especially the property known as the Big Lost River Irrigation System and all rights of the company in connection therewith and all contracts executed by the company relating thereto, which mortgage or deed of trust shall run to the American Trust & Savings Bank and Frank H. Jones, both of Chicago, Illinois, as Trustees, and is to be substantially in the form of the draft thereof attached to said resolution of the Board of Directors and which resolution further provides for the disposition of said bonds when issued.

Now, Therefore, be it resolved that the said resolution of the Board of Directors of this company be and the same is hereby ratified, approved and confirmed, and the Board of Directors and officers of the company are directed, authorized and empowered [526] to carry out the terms of said resolution and from time to time to perform all the covenants and conditions of said bonds and of said mortgage and deed of trust; said resolution together with the resolution of the Board of Directors and the draft of the mortgage or deed of trust therein referred to having been fully and carefully read and considered said resolution was unanimously adopted, all the

vs. Corey Bros. Construction Company et al. 605
stockholders of the company voting in the affirmative.

On motion, duly made, seconded and unanimously carried, the action of the President and Secretary of the Company in executing, sealing, acknowledging and delivering, in the name and on behalf of the company, on the 27th day of August, 1909, a mortgage or deed of trust to The American Trust and Savings Bank and Frank H. Jones, Trustees, on all the property, real and personal, rights, franchises, privileges, water rights, rights of way, contracts and other property of the company to secure the bonds of the company in the present amount of two million (\$2,000,000) dollars be and the same is hereby approved, ratified and confirmed as and for the action of the company.

There being no further business, the meeting adjourned.

B. W. OPPENHEIM,
Secretary.

Approved:

C. B. HURTT,
J. E. CLINTON, Jr.,
LOUIS N. ROOS,
B. W. OPPENHEIM,
N. M. RUICK,
G. S. SPEER,

(Being all the stockholders of said company.)

BIG LOST RIVER IRRIGATION COMPANY.**Minutes of Special Meeting of Board of Directors.****September 7th, 1909.**

Special meeting of the Board of Directors of the Big Lost River Irrigation Company held at its office in the City of Boise, State of Idaho, on the 7th day of September, 1909, at 2 o'clock, P. M. Present, Mr. C. B. Hurtt, Louis N. Roos, J. E. Clinton, Jr., B. W. Oppenheim and N. M. Ruick.

The president, Mr. C. B. Hurtt, acted as chairman, and the secretary, Mr. B. W. Oppenheim, acted as secretary of the meeting.

The secretary presented and read a waiver of notice of the meeting signed by all the directors, and the same was ordered filed and spread upon the minutes as follows:

BIG LOST RIVER IRRIGATION COMPANY.**Waiver of Notice of Meeting of Board of Directors.**

We, the undersigned, comprising the Board of Directors of the Big Lost River Irrigation Company, hereby waive notice of the time, place and purpose of the special meeting of the Board of Directors of the company, and hereby consent to the holding of said special meeting at the office of the company in Boise, Idaho, on the 7th day of September, 1909, at the hour of 10 o'clock, A. M. for the purpose of,

(1) Authorizing and directing the president and secretary of the company, under the seal of the corporation, to request and direct The American Trust and Savings Bank, of Chicago, Illinois, Trustee, to certify all the bonds of this company heretofore issued as rapidly as settlers contracts are deposited

with said Trustee, and to deliver said bonds to Trowbridge & Niver Company, First National Bank Building, Chicago, Illinois.

(2) Transacting any other business that may be brought [528] before said meeting.

Dated, Boise, Idaho, September 7th, 1909.

J. E. CLINTON, Jr.,
C. B. HURTT,
LOUIS N. ROOS,
B. W. OPPENHEIM,
N. M. RUICK.

The following resolution offered by director N. M. Ruick, was duly adopted:

“Resolved, That the President and Secretary of the Company, under the seal of the corporation, request The American Trust & Savings Bank, of Chicago, Illinois, Trustee, to certify all bonds of this company heretofore issued as rapidly as settlers contracts are deposited with the said trustee, and to deliver said bonds to Trowbridge & Niver Company, First National Bank Building, Chicago, Illinois.”

On motion the chairman and secretary were instructed to forward a certified copy of said resolution, together with the direction therein mentioned, to the American Trust & Savings Bank of Chicago, Illinois.

There being no further business before the meeting the meeting was declared adjourned.

Approved:

C. B. HURTT,
Chairman.

B. W. OPPENHEIM,
Secretary. [529]

BIG LOST RIVER IRRIGATION COMPANY.

**Minutes of Special Meeting of Board of Directors.
September 17, 1909.**

Special meeting of the Board of Directors of the Big Lost River Irrigation Company held at its office in the City of Boise, State of Idaho, on the 17th day of September, 1909, at 10 o'clock A. M.

Present, C. B. Hurtt, Louis N. Roos, J. E. Clinton, Jr., N. M. Ruick, and B. W. Oppenheim.

The Secretary presented and read a waiver of the meeting signed by all of the Directors and the same was ordered filed and spread upon the minutes, as follows:

“Big Lost River Irrigation Company. Waiver of Notice of Meeting of Board of Directors.”

We, the undersigned, comprising the Board of Directors of the Big Lost River Irrigation Company, hereby waive notice of the time, place and purpose of the special meeting of the Board of Directors of the Company and hereby consent to the holding of said special meeting at the office of the company in Boise, Idaho, on the 17th day of September, 1909, at the hour of ten o'clock A. M. for the purpose of

(1) Of having and considering reports of officers.

(2) Receiving and acting upon resignations of officers and directors and electing successors.

(3) Transacting any other business that may be

brought before said meeting.

Dated at Boise, Idaho, September 17, 1909.

C. B. HURTT,
LOUIS N. ROOS,
J. E. CLINTON, Jr.,
B. W. OPPENHEIM,
N. M. RUICK,

Directors. [530]

The minutes of the last meeting were read and approved.

The resignation of N. M. Ruick as Vice-President and Director was presented, read and accepted.

The resignation of B. W. Oppenheim as Secretary and Director was presented, read and accepted.

On motion of J. E. Clinton, Jr., seconded by Louis N. Roos, G. S. Speer and John P. Roos, Jr., were elected directors to serve the unexpired terms of Ruick and Oppenheim.

On motion, duly seconded, J. E. Clinton, Jr., was unanimously elected Vice-President to serve the unexpired term of N. M. Ruick.

On motion, duly seconded, John P. Roos, Jr., was unanimously elected Secretary to serve the unexpired term of B. W. Oppenheim.

On motion of G. S. Speer, seconded by J. E. Clinton, Jr., the following resolution was adopted:

Whereas certain preliminary, verbal and written contracts have heretofore been entered into regarding the sale of bonds of this company, and with C. B. Hurtt and Clinton, Hurtt & Co., regarding the sale of Water Contracts, etc.,

Resolved, that the officers of this Company are

hereby authorized to negotiate, prepare and execute formal contracts covering the same.

No further business appearing, the meeting was declared adjourned.

Approved:

C. B. HURTT,

Chairman.

JOHN P. ROOS, Jr.,

Secretary. [531]

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Regular Quarterly Meeting of Board of Directors.

October 5, 1909.

Regular quarterly meeting of the Board of Directors of the Big Lost River Irrigation Company was held at its office in the City of Boise, State of Idaho, on the 5th day of October, 1909, at ten o'clock A. M.

Present, Messrs. C. B. Hurtt, J. E. Clinton, Jr., Louis N. Roos, G. S. Speer and John P. Roos, Jr.

The Minutes of the last meeting was read and approved.

The resignation of Mr. E. C. Stoddard as Treasurer was presented, read and on motion of G. S. Speer seconded by J. E. Clinton, Jr., accepted.

On motion of Louis N. Roos seconded by J. E. Clinton, Jr., John P. Roos, Jr., was elected Treasurer to serve the unexpired term of Mr. Stoddard.

In accordance with a resolution adopted at a special meeting of the Board of Directors on September 17, 1909, the following agreement has been entered into:

This agreement made and entered into this 18th

day of September, 1909, by and between the Big Lost River Irrigation Company, a corporation, organized under the laws of the State of Idaho, the party of the first part, and C. B. Hurtt of Boise, Idaho, the party of the second part and G. S. Speer of Chicago, Illinois, the party of the third part, Witnesseth, That:

Whereas the party of the second part on or about the third day of February, 1909, entered into an agreement with the party of the third part, Wherein and Whereby C. B. Hurtt became the sales agent for the land and water rights and town lots in what is known as the "Big Lost River Irrigation Project," constructed by the party of the first part hereto, which said agreement was thereafter accepted and approved by the said party of the first part; and [532]

Whereas, it has been mutually agreed between the parties hereto that certain changes should be made in said agreement.

Now, Therefore, in consideration of the premises and the covenants and agreements hereinafter contained and in consideration of the sum of Ten Dollars (\$10.00) to first party paid by the party of the second part, the receipt whereof is hereby acknowledged, the parties hereto have agreed and hereby do agree as follows:

First: It is mutually agreed that the terms of the said agreement of February 3rd, 1909, in relation to the sale of water rights for school lands or lands owned by the State of Idaho and not segregated under the Act of Congress known as the Carey Act, are hereby modified so that the commission to be paid

the party of the second part for water rights sold for such lands shall be Three and 50/100 Dollars (\$3.50) per acre; such commission to be paid in the same manner as commissions earned on the sale of water rights for Carey Act lands.

Second: The party of the second part in the sale of water rights for lands in private ownership and lands held under the public land laws of the United States and susceptible of irrigation from the irrigation works of first party, shall be entitled to the same commission and payable in the same manner as provided in said contract of February 3rd, 1909, in the sale of water rights for Carey Act lands.

Third: The promissory notes given to the party of the second part by the party of the first part for commissions earned by second party, as provided in said agreement of February 3, 1909, shall bear interest at six per cent (6%) per annum from the date when the water contracts upon which said commissions were earned begin to bear interest. [533]

Fourth: That in lieu of the twenty five per cent (25%) commission to be paid the party of the second part under said agreement of February 3, 1909, on the sale of town lots, it is hereby agreed that the said second party shall receive a commission of twenty per cent (20%) of the gross amount at which said lots are sold, and thirty three and one-third per cent ($33\frac{1}{3}\%$) of the advance in price of town lots over the price at which such lots are first placed on the market.

Attached hereto is a copy of the said agreement of February 3, 1909, which said agreement is hereby

modified and superseded by this agreement in so far as the terms hereof conflict with or modify the said agreement of February 3, 1909. In all other respect the said agreement last above mentioned remains in full force and effect.

It is mutually agreed and understood that the agreement this day entered into and the said agreement of February 3, 1909, shall terminate and each party hereto be released from the terms thereof, at the end of five years from the date hereof, except as to the payment of commissions earned by the party of the second part before the expiration of such period.

In witness whereof, the said party of the first part has hereunto caused its name to be subscribed by its President, attested by its Secretary, and the party of the second part, and the said party of the third part have hereunto set their hands and seals, in duplicate, the day and year first above written.

BIG LOST RIVER IRRIGATION CO.

By C. B. HURTT, (Signed)

President.

Attest: JOHN P. ROOS, Jr., (Signed)

Secretary.

C. B. HURTT. (Seal)

G. S. SPEER. (Seal)

Boise, Idaho, February 3, 1909.

Mr. G. S. Speer,
Chicago, Ill.

Dear Sir:—

I will undertake to act as the sales agent for the land and water rights within the boundaries of the land situated in Fremont and adjacent Counties, State of Idaho, segregated under what is known as the "Big Lost River Irrigation Project" and also all town lots included in any town site or town sites located in connection with such project, within or without the above boundaries, upon the following terms and conditions:

That I or such company or corporation as I may organize for that purpose, shall have the exclusive agency of such lands, water rights and town lots.

You to lay out and establish such town site or town sites, within or adjacent to the boundaries above mentioned, as to you may seem most advantageous.

That this proposal is made on the basis that all water rights for such land shall be sold at such price or prices as may be fixed by the Company constructing such works, not exceeding, however, the price stated in the contract between such company and the State of Idaho.

I contract and agree to be prepared to begin selling said lands and water rights within ten days from the date the price for water rights is fixed by the State Land Board and a contract is signed between the State of Idaho and the Irrigation Company, and I agree to maintain sufficient selling force to sell said land and water rights fast enough to provide at all

times sufficient water contracts to collateral the bonds of the Irrigation Company so that eighty per cent (80%) of the face value of said bonds will be sufficient to pay all engineering and construction charges of the Company as fast as the same may become due. [535]

That the price at which town lots shall be sold shall be agreed upon within sixty (60) days from the date of the filing of the Townsite plats with the County Clerk.

That such water rights shall be sold for a cash payment of not to exceed ten per cent of the contract price and the remainder in deferred payments, no such deferred payment to exceed ten per cent of the purchase price. All deferred payments to draw interest at the rate of six per cent. per annum.

You are to furnish all maps, plats and tracings, etc., of the lands and townsites and all other data and information as may be necessary for the sale of the lands, water rights and town lots.

That you will set 4x4 stakes at each section corner and each quarter section corner, properly marked upon such land.

That I shall receive as compensation for services in the sale and advertising of such lands and water rights, the sum of Seven Dollars (\$7.00) per acre, Two Dollars (\$2.00) per acre in cash from first payment; the remaining Five Dollars (\$5.00) to be payable pro rata as the deferred payments on said land and water rights are paid, but the obligation of the Irrigation Company to pay this remaining Five Dollars is to be evidenced by the Company's promissory

notes maturing serially on an average of ninety days after the respective deferred payments on land and water rights are due; All notes maturing more than three years after date of issue are to draw interest at rate of six per cent. per annum.

That on the sales of town lots, I shall receive as compensation a commission of twenty-five per cent of the gross amount at which such lots are sold. Forty per cent. of such commission shall be paid in cash out of the first payment on each sale and the remaining sixty per cent of such commission shall be paid in town lot contracts or mortgages to be properly assigned to me [536] when demanded or as sales are made.

That upon the acceptance of this proposal, I will take complete charge of the sales of such land and water rights upon the above and foregoing terms and will employ a sufficient number of men to properly handle such work and will do proper advertising in connection therewith.

It is further understood that the proposal when accepted by you shall constitute a contract and shall bind each of us, and also our respective heirs, executors, administrators, successors and assigns.

Yours truly,

(Signed) C. B. HURTT.

The above and foregoing proposal is hereby accepted this 3rd day of February, 1909.

(Signed) G. S. SPEER.

No further business appearing, the meeting was declared adjourned.

C. B. HURTT,
Chairman.

JOHN P. ROOS, Jr.,
Secretary.

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Annual Meeting of Stockholders.

January 11, 1910.

The regular annual meeting of the stockholders of the Big Lost River Irrigation Company was held at the office of the Company, Room 307 Boise City National Bank Building, City of Boise, State of Idaho, on January 11, 1910, at two o'clock P. M.

The President, Mr. C. B. Hurtt, called the meeting to order [537] and directed the Secretary to call the roll and canvass the stock represented, which was as follows:

C. B. Hurtt.....	2	Shares
J. E. Clinton, Jr.....	1	“
Louis N. Roos.....	1	“
G. S. Speer.....	1	“
John P. Roos, Jr.....	1	“
Western Mortgage & Loan Co.		
By John P. Roos, Jr., Sec.	9900	

The Secretary reported that 9906 shares of stock were represented and the same being more than a majority the meeting was proceeded with.

The Secretary presented and read Waiver of Notice of the meeting signed by all stockholders and the same was ordered filed and spread upon the minutes as follows:

Waiver of Notice of Annual Meeting of Stockholders.

We, the undersigned, stockholders of the Big Lost River Irrigation Company, hereby waive notice of the time, place and purpose of the annual of the stockholders of the company, and hereby consent to the holding of said annual meeting at the office of the Company at Boise, Idaho, on January 11th, 1910, at two o'clock P. M.

And we do hereby waive all requirements of the statutes of Idaho as to the notice of this meeting and publication thereof; and consent to the transaction of such business as may come before said meeting.

Dated at Boise, Idaho, January 11, 1910.

C. B. HURTT,
J. E. CLINTON, Jr.,
LOUIS N. ROOS,
G. S. SPEER,
JOHN P. ROOS, Jr.,

WESTERN MORTGAGE & LOAN CO.

By JOHN P. ROOS, Jr.,

Sec'y. [538]

The minutes of the first incorporators' meeting were read and on motion duly approved.

The election of Directors was then taken up and Messrs. Louis N. Roos, and J. E. Clinton, Jr., appointed tellers and a vote by ballot being taken, resulted as follows:

C. B. Hurtt.....	9906 Shares
J. E. Clinton, Jr.....	9906
Louis N. Roos.....	9906

G. S. Speer.....9906

John P. Roos, Jr.....9906

The five persons above named having received the vote of all stock present, were declared duly elected Directors for the ensuing year or until their successors are elected and qualify.

No further business being presented, the meeting, on motion, was declared adjourned.

JOHN P. ROOS, Jr.,
Secretary.

C. B. HURTT,
Chairman.

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Meeting of Board of Directors, January 11, 1910.

Regular meeting of Board of Directors of the Big Lost River Irrigation Company was held at its office, Room 307 Boise City National Bank Bldg. in the City of Boise, State of Idaho, on the 11th day of January, 1910, at three o'clock P. M.

Present, C. B. Hurtt, Louis N. Roos, J. E. Clinton, Jr., and John P. Roos, Jr., Absent, G. S. Speer.

The minutes of the last meeting were read and approved.

The following gentlemen were unanimously chosen officers of the Company to serve until the next annual meeting for the election of Directors of the company or until their successors are chosen and qualify.

President, C. B. Hurtt.

Vice-President, J. E. Clinton, Jr.

Secretary, John P. Roos, Jr.

Treasurer, John P. Roos, Jr. [539]

And all being present entered upon the discharge of their duties as such officers.

The President reported that pursuant to previous understanding he had issued to the order of Trowbridge & Niver Company, checks of the Company aggregating \$29,000.00 as an additional bonus on bond sales.

Whereupon the following resolution was offered and upon motion was unanimously adopted.

Resolved, that the action of the President in paying to Trowbridge & Niver Company, or *tiehr* order as an extra and additional bonus for the sale of the bonds of this Company, the sum of \$29,000.00 (Twenty-nine Thousand Dollars), is hereby ratified, approved and confirmed and the President is hereby further authorized, empowered and instructed to pay to said Trowbridge & Niver Company, or order, the further sum of \$21,000.00 (Twenty-one Thousand Dollars) for services rendered as aforesaid, in addition to all other commissions heretofore authorized.

No further business appearing the meeting was declared adjourned.

JOHN P. ROOS,
Secretary.

C. B. HURTT,
Chairman.

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Special Meeting of Stockholders.

March 12, 1910.

A special meeting of the Stockholders of the Big Lost River Irrigation Company was held at its office

in the City of Boise, State of Idaho, on the 12th day of March, 1910, at ten o'clock A. M. [540]

All stockholders being present the meeting was proceeded with.

The Secretary presented and read a Waiver of Notice of the meeting signed by all stockholders and the same was ordered filed and spread upon the minutes as follows:

Waiver of Notice of Special Meeting of Stockholders.

We, the undersigned stockholders of the Big Lost River Irrigation Company hereby consent to the holding of a special meeting of the Stockholders of said Company at the office of the Company at Boise, Idaho, on the 12th day of March, 1910, at ten o'clock A. M., for the purpose, among others, of considering, authorizing, ratifying and approving the execution of a mortgage or deed of trust and bonds of the Company.

Dated at Boise, Idaho, March 12, 1910.

C. B. HURTT,

J. E. CLINTON, Jr.,

LOUIS N. ROOS,

G. S. SPEER,

JOHN P. ROOS, Jr.,

WESTERN MORTGAGE & LOAN CO.,

By JOHN P. ROOS, Jr., Sec'y.

The minutes of the last meeting were read and approved.

Mr. Louis N. Roos offered the following resolution, which was, on motion, unanimously adopted.

Resolved, by the stockholders of the Big Lost River Irrigation Company, in stockholders' meeting

duly assembled, that the Board of Directors of this Company are hereby authorized to borrow the sum of \$400,000.00 for such time and at such rate of interest as they may deem best, to be used for the purpose of completing, equipping and operating its irrigation system within the Counties of Blaine, Bingham, Custer and Fremont, in the State of Idaho, and for the general uses of the Company, and in evidence thereof to issue the bonds of the Company, and to secure the same by mortgage or deed of trust of all or any part or portion of its corporate property, whether real, personal or mixed, which the Company now owns or may hereafter acquire; subject however, to all rights therein existing under the first *first* mortgage or [541] deed of trust made by this Company, bearing date July 1, 1909, securing the \$2,000,000.00 of 6% bonds therein authorized to be presently issued and such additional bonds as may be issued under the provisions thereof, which said new mortgage or deed of trust shall bear the date of the 1st day of January, A. D. 1910.

There being no further business the meeting adjourned.

JOHN P. ROOS, Jr.,
Secretary.

C. B. HURTT,
Chairman.

BIG LOST RIVER IRRIGATION COMPANY.
Minutes of Special Meeting of Board of Directors.
March 12, 1910.

A special meeting of the Board of Directors of the Big Lost River Irrigation Company was held at its office in the City of Boise, State of Idaho, on the

12th day of March, 1910, at eleven o'clock A. M.

Present: Messrs. C. B. Hurtt, J. E. Clinton, Jr., Louis N. Roos, G. S. Speer and John P. Roos, Jr.

The Secretary presented and read a Waiver of Notice of the meeting signed by all of the Directors and the same was ordered filed and spread upon the minutes as follows:

Waiver of Notice of Special Meeting of Directors.

We, the undersigned, Directors of the Big Lost River Irrigation Company, a corporation organized and existing under the laws of the State of Idaho, hereby waive notice of the place and purpose of the meeting of the Board of Directors and of the business to be transacted at said meeting and fix Saturday, March 12, 1910, at eleven o'clock A. M., as the time and the office of the Company in the City of Boise, County of Ada and State of Idaho, as the place of said meeting, the purpose being the authorization of the Company to borrow money to the amount of \$400,000.00 and to issue Collateral Trust Bonds therefor; the [542] authorizing and directing the proper officers of the Company to execute, under the corporate seal, said bonds and a mortgage or deed of trust, to secure the same; and the transaction of such other business as may be brought before said meeting.

Dated at Boise, Idaho, March 12, 1910.

C. B. HURTT,
J. E. CLINTON, Jr.,
LOUIS N. ROOS,
G. S. SPEER.
JOHN P. ROOS, Jr.,
Directors.

On motion of J. E. Clinton, Jr., seconded by G. S. Speer, the following resolution was unanimously adopted:

Resolved by the Board of Directors of the Big Lost River Irrigation Company:

First: That the resolution passed and adopted by the stockholders of this Company, at their meeting held this day, relating to the issue of bonds of the Company to the amount of \$400,000.00 be duly performed, effectuated and fulfilled and the same is hereby approved, ratified and adopted.

Second: That the President and Secretary of this Company be, and they hereby are authorized and directed, in its behalf and under its corporate seal, to execute and deliver to The American Trust & Savings Bank and Frank H. Jones, both of Chicago, Illinois, as Trustees, a mortgage or deed of trust to bear the date of January 1st, A. D. 1910, and to be known as "Collateral Trust Mortgage," and substantially of the tenor and draft thereof now submitted to this meeting, or of such tenor and form as the said President and Secretary may deem proper (and their execution of any such deed of trust shall be conclusive evidence of their approval of the same), upon all or any part or portion of the corporate property, whether real, personal or mixed, which the Company now owns or may hereafter acquire, subject to all rights therein existing under the First Mortgage or deed of Trust, bearing date of July 1, A. D. 1909, heretofore executed by [543] this Company, to secure the \$2,000,000.00 of 6% bonds therein authorized to be presently issued, and such

additional bonds as may be issued under the provisions thereof, which said Collateral Trust Mortgage shall secure an issue of bonds to be dated January 1, 1910, and to be known and designated as "Big Lost River Irrigation Company, Collateral Trust Bonds," not exceeding in the aggregate the principal sum of \$400,000.00 and payable in gold coin of the United States, of, or equal to, the present standard of weight and fineness, at the American Trust & Savings Bank in the City of Chicago, Illinois.

Third: The said bonds shall bear interest at the rate of six per centum (6%) per annum, until said principal sum shall have been paid such interest to be paid semi-annually, on the first day of January, and the first day of July, in each year; both principal and interest of said bonds shall be made payable without deduction for any tax, or taxes, or stamp duties, which this Company may be required to pay, or to retain therefrom, under or by reason of any present or future law of the United States or of any State, territory, county or municipality thereof, the Company hereby agreeing to pay off such tax or taxes, and stamp duties; such bonds shall be of the denomination of \$500.00 each, shall be numbered from one (1) to eight hundred (800) inclusive, and shall be due and payable January 1, 1920, said bonds numbered 1 to 600, shall be redeemable at the option of the Company, in their reverse numerical order, on January 1, 1915, or on any interest payment date thereafter before maturity, at par, accrued interest and a premium of three (3) per cent; said bonds numbered 601 to 800 shall be redeemable at the op-

tion of the Company, in their reverse numerical order, on any interest payment date before maturity, at par, accrued interest and a premium of three (3) per cent.

Fourth: That the President and Secretary of this Company shall execute in the name and in behalf of this Company and under [544] its corporate seal, such bonds to be secured by the said Collateral Trust Mortgage, in the aggregate amount of \$400,000.00. The coupons to be attached to said bonds shall be for the sum of \$15.00 each and shall be authenticated by the fac-simile signature of the treasurer of this Company.

Fifth: That all of said bonds after being executed by the officers of the Company shall be delivered to The Americian Trust & Savings Bank, Trustee, which shall at once certify and issue to the Treasurer of the Company, or to such persons as he may, in writing designate, any or all of the said bonds.

Sixth: That the said bonds and the coupons thereto attached shall be in substantially the following form, to-wit:

United States of America,

No. _____.

State of Idaho.

Big Lost River Irrigation Company.

\$500.

Collateral Trust Bond.

\$500.

Know all men by these presents, that the undersigned, Big Lost River Irrigation Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, for value received, acknowledges itself to owe and hereby promises to

pay to the bearer hereof the sum of five hundred (\$500) dollars on the first day of January, A. D. 1920, together with interest thereon from the date hereof until paid at the rate of six (6) per cent. per annum payable semi-annually on the first days of January and July in each year upon the presentation and surrender of the annexed interest coupons as they severally become due. Both principal and interest are payable in gold coin of the United States of America, of, or equivalent to, the present standard of weight and *fairness*, at The American Trust & Savings Bank in the City of Chicago, Illinois.

Both principal and interest are payable without deduction for any tax, charge or assessment whatever which the undersigned [545] may be required or permitted to pay or retain therefrom by any statute law, ordinance or regulation.

This bond is one of a series of bonds of said Big Lost River Irrigation Company of like date, tenor and effect, save as to number and redemption provision, numbered consecutively from one (1) to eight hundred (800) inclusive, issued and to be issued to an amount not exceeding in the aggregate the principal sum of four hundred thousand dollars, all of which bonds are equally secured by a mortgage or deed of trust of even date herewith, executed, acknowledged, delivered and recorded according to the laws of the State of Idaho, by the undersigned to said The American Trust & Savings Bank and Frank H. Jones, both of Chicago, Illinois, as Trustees, conveying to said Trustees, in trust certain property in said mortgage, or deed of trust described to which

mortgage or deed of trust reference is hereby made for a description of the property mortgaged or pledged, the nature and extent of the security and the rights of the holders of bonds under the same.

In case of default in the performance of the covenants of said mortgage or deed of trust continuing for the period therein mentioned, the principal of this bond may be declared due in the manner and upon the conditions prescribed therein.

This bond shall not become obligatory for any purpose until authenticated by the signature of said The American Trust & Savings Bank, or of its successor or successors in trust to the Trustee's Certificate endorsed hereon.

In Witness Whereof, said Big Lost River Irrigation Company has caused this bond to be signed by its President and attested by its Secretary under its corporate name and seal and the interest coupons thereto attached to be authenticated by the fac-simile signature of its Treasurer this 1st day of January, A. D. 1910. [546]

BIG LOST RIVER IRRIGATION CO.

By C. B. HURTT,
President.

Attest:

Secretary.

(Form of Coupon.)

No. _____

\$15.00

On the first day of January, July, 19—, the Big Lost River Irrigation Company, a corporation, of

the State of Idaho, promises to pay to bearer the sum of Fifteen Dollars, in United States Gold Coin, at The American Trust & Savings Bank in the City of Chicago, Illinois, being six months interest due that day on its Collateral Trust Bond of January 1, 1910, No. ———.

_____,
Treasurer.

Trustee's Certificate.

Chicago, Illinois,

This is to certify that this bond is one of the bonds described in the mortgage or deed of trust within mentioned.

AMERICAN TRUST & SAVINGS BANK,

Trustee,

By _____,

Secretary.

Bonds numbered 1 to 600, inclusive, shall contain the following clause:—

“This bond may be redeemed at the option of the Company, on January 1, 1915, or any interest payment date thereafter before maturity, at par, accrued interest and a premium of three per cent.” [547]

Bonds numbered 601 to 800, inclusive, shall contain the following clause:

This bond may be redeemed, at the option of the Company, on any interest payment date before maturity, at par, accrued interest and a premium of three per cent.

No further business appearing the meeting adjourned.

JOHN P. ROOS, Jr.,
Secretary.

C. B. HURTT,
Chairman.

BIG LOST RIVER IRRIGATION COMPANY.
Minutes of Special Meeting of Board of Directors.
May 31, 1910.

A special meeting of the Board of Directors of the Big Lost River Irrigation Company was held at its office in the City of Boise, State of Idaho, on the 31st day of May, 1910, at eleven o'clock A. M.,

Present, J. E. Clinton, Jr., Louis N. Roos, and John P. Roos, Jr.; Absent, C. B. Hurtt and G. S. Speer.

In the absence of the President, Mr. C. B. Hurtt, the Vice-President, Mr. J. E. Clinton, Jr., presided.

The Secretary presented and read a waiver of the meeting signed by all of the Directors, and the same was ordered filed and spread upon the minutes as follows:

BIG LOST RIVER IRRIGATION COMPANY.
Waiver of Notice of Special Meeting of Directors.
We, the undersigned, Directors of the Big Lost River Irrigation Company, a corporation organized and existing under the laws of the State of Idaho, hereby waive notice of the place and purpose of the meeting of the Board of Directors and of the business to be transacted at said meeting and fix Tuesday, May 31, 1910, at eleven o'clock A. M. as the time and the office of the Company in the City of Boise,

County of Ada, and State of Idaho, [548] as the place of said meeting, the purpose being the receiving and acting upon the resignation of directors and the electing of successors, and the transacting of such other business as may be brought before said meeting.

Dated at Boise, Idaho, May 31, 1910.

C. B. HURTT,
J. E. CLINTON, Jr.,
G. S. SPEER,
LOUIS N. ROOS,
JOHN P. ROOS, Jr.,
Directors.

The minutes of the last meeting were read and approved.

The resignation of Mr. G. S. Speer as a Director of this Company was presented, read and on motion, accepted.

Upon motion, Mr. W. E. Corey of Ogden, Utah, was elected as a Director to serve the unexpired term of Mr. G. S. Speer.

The Secretary offered the following resolution, which on motion was duly adopted:

Resolved, That all resolutions heretofore passed by this Board and all instructions heretofore given by this Company to The American Trust and Savings Bank of Chicago, Illinois, authorizing, directing or instructing said The American Trust & Savings Bank to deliver to the Trowbridge & Niver Company, a corporation organized under the laws of the State of New Jersey, and doing business in the City of Chicago, State of Illinois, the bonds of the Big Lost

River Irrigation Company without collecting or receiving payment therefor at the time of such delivery, be and the same are hereby recinded and annulled.

Be it further resolved that the said The American Trust and Savings Bank be and hereby is authorized, instructed and directed to deliver to the order of the said Trowbridge & Niver Company, or such other party or parties as the Treasurer of this Company may in writing designate, all bonds authorized to be issued by this Company after the same have been duly certified as required by the Trust Deed securing the same upon the payment to said The American Trust & Savings Bank for the use and benefit of this [549] Company, of a sum or amount equal to Eighty per cent (80%) of the par value of the bonds so delivered (together with all accrued interest thereon); And all moneys so received shall be payable upon the order check or draft of the Big Lost River Irrigation Company, signed by John P. Roos, Jr., Treasurer, and countersigned by C. B. Hurtt, President of said Company, or any successor, Treasurer or President of said Company.

Mr. George F. Sprague was appointed General Manager of this Company at a salary of \$300.00 per month and expenses.

The President and Secretary were authorized and instructed to execute and deliver upon the delivery to the Big Lost River Irrigation Company of all the right, title and interest to what is known as the "Tombs Ditch," water contracts of this Company, as follows:

A free or paid up Water Right to what is known

as the "Tombs Ranch" described as being Lots 3 & 4, SW./4 SW./4, & SW./4 SE./4, Sec. 7,-3-26-

A free or paid up Half Water Right to Ralph J. LaFever, on the NE./4, Sec. 18-3-26- consisting of 160 acres.

A free or paid up Half Water Right to Melvin D. Sweet on the SE./4, Sec. 18-3-26, consisting of 160 acres.

A Half price or Twenty (20) Dollars per acre Water Right to Agnes B. Fleischer on the NE./4, Sec. 17-3-26, consisting of 160 acres.

A Half price or Twenty (20) Dollars per acre Water Right to Louis A. Lafferty on the E. 1/2 SE./4 and SW./4, SE./4, Sec. 10-3-26, consisting of 120 acres.

A Water Right at the rate of Thirty-seven (37) Dollars per acre to Ralph J. LaFever on Lots 3, 4, 5 and SE./4 NW./4, Sec. 6-3-26, containing 159 acres. [550]

The Secretary was instructed to issue and deliver to Geo. F. Sprague, Trustee, the remainder of the unissued stock of this Company.

The Secretary was authorized and instructed to deed to the Arco Townsite Company all lots which have been transferred from them to the Big Lost River Irrigation Company for right of way purposes, and to accept from them a deed conveying a right of way forty-five (45) feet wide through the townsite as the line of Canal now runs.

No further business appearing, the meeting was declared adjourned.

J. E. CLINTON, Jr.,
Chairman.

JOHN P. ROOS, Jr.,
Secretary.

BIG LOST RIVER IRRIGATION CO.

**Minutes of Special Meeting of Board of Directors.
June 27, 1910.**

A special meeting of the Board of Directors of the Big Lost River Irrigation Company was held at its office in the City of Boise, County of Ada and State of Idaho, on the 27th day of June, 1910, at four thirty o'clock P. M.

Present, C. B. Hurtt, Louis N. Roos, and John P. Roos, Jr., Absent, J. E. Clinton, Jr., Unqualified, W. E. Corey.

The Secretary presented and read a Waiver of the meeting signed by all of the Directors and the same was ordered filed and spread upon the minutes as follows: [551]

Waiver of Notice of Special Meeting of Directors.

We, the undersigned Directors of the Big Lost River Irrigation Company, a corporation, organized and existing under the laws of the State of Idaho, hereby waive notice of the meeting of the Board of Directors and of the business to be transacted at said meeting and fix Monday, June 27, 1910, at four thirty P. M. as the time and the office of the Company in the City of Boise, County of Ada and State of Idaho, as the place of said meeting, the purpose being the authorization of J. E. Clinton, Jr., Vice-

President of the Company to borrow the sum of Fifty Thousand Dollars (\$50,000) and to pledge Settlers Contracts to secure such loan and the transaction of such other business as may be brought before said meeting.

Dated at Boise, Idaho, June 27, 1910.

C. B. HURTT,
LOUIS N. ROOS,
JOHN P. ROOS, Jr.,
J. E. CLINTON, Jr.,
Directors.

The minutes of the last meeting were read and approved.

Upon motion of Louis N. Roos, seconded by C. B. Hurtt, the following resolution was adopted:

Resolved that J. E. Clinton, Jr., Vice-President of the Big Lost River Irrigation Company, be and he is hereby authorized to negotiate a loan or loans in behalf of this Company not to exceed Fifty Thousand Dollars (\$50,000) and to pledge Settlers' Contracts now owned or hereafter acquired by the Company in such amount or amounts as may be necessary to secure such loan or loans.

The Secretary offered the following resolution which, on motion was duly adopted:

Resolved, that all resolutions heretofore passed by this board and all instructions heretofore given by this Company to the American Trust & Savings Bank of Chicago, Illinois, [552] authorizing, directing or instructing said The American Trust & Savings Bank to deliver to the Trowbridge & Niver Company, a corporation, organized under the laws

of the State of New Jersey, and doing business in the City of Chicago, State of Illinois, and C. B. Hurtt, President of the Big Lost River Irrigation Company, be, and the same are hereby recinded and annulled.

Be it further Resolved that the said The American Trust & Savings Bank be, and hereby is authorized, instructed and directed to deliver to Jas. E. Clinton, Jr., or Order, or such other party or parties as the Treasurer of this Company, may in writing, designate, all bonds authorized to be issued by this Company, after the same have been duly certified as required by the first and second mortgage trust deeds securing the same without collecting or receiving payment therefor at the time of such delivery.

The Secretary offered the following resolution which on motion, was duly adopted:

Resolved, that J. E. Clinton, Jr., Vice-President, of the Big Lost River Irrigation Company, be and hereby is authorized to use all bonds received by him as Collateral securing any loan or loans which he may make in behalf of this Company.

No further business being presented the meeting adjourned.

JOHN P. ROOS, Jr.,

Secretary.

C. B. HURTT,

Chairman.

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Special Meeting of Board of Directors.

July 14, 1910.

A special meeting of the Board of Directors of the Big Lost River Irrigation Company was held at its office in the City of Boise, County of Ada and State

vs. Corey Bros. Construction Company et al. 637

of Idaho, on the 14th day of July, 1910, at four o'clock P. M. [553]

Present, C. B. Hurtt, James E. Clinton, Jr., Louis N. Roos, and John P. Roos, Jr.,

Absent, W. E. Corey, unqualified.

The Secretary presented and read a Waiver of the meeting signed by all qualified Directors and the same was ordered filed and spread upon the minutes as follows:

BIG LOST RIVER IRRIGATION COMPANY.
Waiver of Notice of Special Meeting of Directors.

We, the undersigned Directors of the Big Lost River Irrigation Company, organized and existing under the laws of the State of Idaho, hereby waive notice of the place and purpose of the meeting of the Board of Directors and of the business to be transacted at said meeting and fix Thursday, July 14, 1910, at four o'clock P. M., as the time and the office of the Company in the City of Boise, County of Ada and State of Idaho, as the place of said meeting, the purpose being the authorization of C. B. Hurtt, President of this Company, to obligate it as he may deem best to secure the necessary funds for the completion of the system, and the transaction of such other business as may be brought before said meeting.

Dated at Boise, Idaho, July 14, 1910.

J. E. CLINTON, Jr.,

C. B. HURTT,

LOUIS N. ROOS,

JOHN P. ROOS, Jr.,

Directors.

638 *Continental & Commercial etc. Bank et al.*

The minutes of the last meeting were read and approved.

The Secretary offered the following resolution which, on motion was duly adopted:

Resolved by the Directors of the Big Lost River Irrigation Company, that authority be, and hereby is given to Mr. C. B. Hurtt, President of this Company, to obligate this Company as he may deem necessary, to secure funds for the completion of this [554] Company's Irrigation System.

No further business being presented the meeting adjourned until 2 o'clock P. M. Monday July 25, 1910.

J. E. CLINTON, Jr.,
Chairman.

JOHN P. ROOS, Jr.,
Secretary.

BIG LOST RIVER IRRIGATION COMPANY.

Minutes of Adjourned Meeting, July 25, 1910.

Pursuant to adjournment, the Directors of the Big Lost River Irrigation Company met at the office of the Company at 2 o'clock P. M. Monday July 25, 1910.

Present, Jas. E. Clinton, Jr., Louis N. Roos, and John P. Roos, Jr.

In the absence of Mr. C. B. Hurtt, President, Mr. J. E. Clinton, Jr., Vice-President, presided.

The minutes of the previous meeting were read and approved.

As Mr. W. E. Corey who was elected as a Director of this Company has declined to qualify as such officer, Mr. George F. Sprague was unanimously

vs. Corey Bros. Construction Company et al. 639

elected as such Director to serve until the next annual election for Directors or until his successor qualifies.

On motion the meeting was adjourned to meet at Room 1245 First National Bank Building, Chicago, Illinois, at 2 o'clock P. M. Saturday July 30, 1910.

J. E. CLINTON, Jr.,

Chairman. [555]

JOHN P. ROOS, Jr.,

Secretary.

Chicago, Ill., July 30, 1910.

The minutes of the adjourned meeting were read and approved.

In the absence of the Secretary Mr. J. E. Clinton, Jr., was appointed Secretary of the meeting, he with Mr. C. B. Hurtt and Geo. F. Sprague being present and making a quorum.

The resignation of Louis N. Roos was read and accepted and E. W. Hanna was duly elected in his place.

There being no further business, the directors' meeting adjourned to convene again at 1245 First Nat. Bank Bldg., Chicago, Ill., Tuesday, August 2, 1910.

C. B. HURTT,

President.

Attest: J. E. CLINTON, Jr.

Temporary Secretary.

BIG LOST RIVER IRRIGATION COMPANY.
Minutes of Special Meeting of Board of Directors.
Jan. 16, 1911.

Pursuant to written call and waiver of notice, the

Board of Directors of the Big Lost River Irrigation Company met in its office in the Boise City National Bank Building, City of Boise, State of Idaho, on the 16th day of January, 1911, at 11:30 o'clock A. M. Those present were C. B. Hurtt, J. E. Clinton, Jr., and John P. Roos, Jr.

The Secretary presented a call and written waiver of notice of the meeting signed by all of the Directors, and the same was ordered filed and spread upon the minutes as follows:

We, the undersigned, Directors of the Big Lost River Irrigation Company, a corporation, organized and existing under the laws [556] of the State of Idaho, hereby waive notice of the place, and purpose of the meeting of the Board of Directors, and of the business to be transacted at said meeting and fix Monday, January 16, 1911, at 11:30 o'clock A. M. as the time and the office of the Company in the City of Boise, County of Ada and State of Idaho, as the place of said meeting, the purpose being the consideration of the assigning of a certain claim against the State of Idaho for \$4660.00, and the transaction of such other business as may be brought before said meeting.

Dated at Boise, Idaho, January 16, 1911.

C. B. HURTT.

J. E. CLINTON, Jr.

JOHN P. ROOS, Jr.

GEORGE F. SPRAGUE.

EUGENE W. HANNA.

The matter of assigning a claim against the State of Idaho for \$4660.00 was presented and upon motion of Mr. J. E. Clinton, Jr., seconded by Mr. C. B.

Hurt, the following resolution was unanimously adopted.

Resolved, that the President and Secretary of this Company be and are hereby authorized to assign to Mr. N. M. Ruick, a certain claim against the State of Idaho for \$4660.00; said claim being for monies advanced on July 17, 1909, by us to the said State, to procure the survey of certain lands included within the Big Lost River Irrigation Project, with full power to sue for, collect, receipt for, discharge, sell and assign the same.

No further business appearing, the meeting was declared adjourned.

C. B. HURT,
Chairman.

Attest: JOHN P. ROOS, Jr.,
Secretary. [557]

[Title of Court and Cause.]

Opinion.

H. H. HENDERSON, Attorney for the Plaintiff and the Intervenor.

LYNNE FOX CLINTON, Attorney for the Defendant Big Lost River Irrigation Co.

MAYER, MEYER, AUSTRIAN & PLATT, RICHARDS & HAGA, N. M. RUICK, and A. C. MILLER, Attorneys for the American Trust & Savings Bank, and Frank H. Jones, Trustees.

CLARK & BUDGE, Attorneys for Certain Other Defendants.

DIETRICH, District Judge:

This action was brought by Corey Bros. Construc-

tion Company, a Utah corporation, to foreclose a mechanic's lien upon a partially constructed irrigating system belonging to the defendant Big Lost River Irrigation Company, an Idaho corporation, [558] (hereinafter referred to as the Irrigation Company). Jurisdiction rests upon diversity of citizenship, the requisite amount being involved. The defendants American Trust & Savings Bank and Frank H. Jones (hereinafter referred to as the mortgagee), are the trustees named in a trust deed covering the system, and given to secure an issue of bonds, a large part of which has been sold. The irrigation system is what is popularly known as a "Carey Act Project," constructed under a contract entered into by the State of Idaho with one George S. Speer on the 27th of May, 1909, pursuant to the provisions of Section 4 of an Act of Congress approved August 18, 1894 (28 Stat. 422), as amended by the Act of June 11, 1896 (29 Stat. 413-434), and Section 3 of the Act of March 3, 1901 (31 Stat. 1188), and of sections 1613 to 1634, inclusive, of the Idaho Revised Codes. Speer was the vice-president of a corporation known as Trowbridge & Niver, of Chicago, who were engaged in selling irrigation and other bonds, and apparently, as the representative of this company, he entered into the contract with the State for the purpose of promoting the project and selling to the public the bonds to be issued upon the system. The plan was to secure the contract with the State, and thereupon organize a corporation, in whose name the project was to be carried on, cause it to issue bonds secured by a trust deed upon the system, and sell

the bonds as rapidly as money was needed to pay the contractor, who was to do the construction work under the supervision of Arnold & Company, an engineering company, also of Chicago. Accordingly, on June 15, 1909, Speer caused the defendant Irrigation Company to be organized, with a capital stock of \$1,000,000.00, substantially all of which was, about thirty days later, issued to him in exchange for his contract with the State. In the meantime he and those who were to be associated with him in the organization of the Irrigation Company, in order to avoid delay, had a verbal agreement with the plaintiff by which it was to do the construction work, and accordingly it at [559] once began to assemble its material and workmen, and it actually commenced construction work about June 15th. A writing was drafted at the time of the oral agreement, incorporating the substantial provisions thereof, and this was, without change, later executed by the Irrigation Company and sent to Utah, where it was executed by the plaintiff on or about August 26, 1909. The written agreement between the Irrigation Company and Arnold & Company, covering engineering services, was executed on the — day of —, 1909. A trust deed covering all of the property of the Irrigation Company, to secure a \$2,000,000.00 issue of bonds bearing date July 1, 1909, was executed August 27, 1909, and was filed for record in Bingham and Blaine counties September 3, 1909, and in Custer and Fremont counties a few days later. While not very material, it may be noted that another trust deed, securing an additional bond issue of \$400,000.00, was

executed January 1, 1910, and shortly thereafter placed on record in the several counties named. All the bonds were delivered to Trowbridge & Niver to be sold by them as the fiscal agents of the Irrigation Company. Under its contract, the plaintiff was to be paid as the work progressed ninety per cent upon monthly estimates to be furnished by the engineer. The mode of procedure actually followed was for Arnold & Company's chief representative in the field to send to his company at Chicago such an estimate, which was thereupon approved by their engineer having supervision of that class of work, and after such approval the estimate was passed to Trowbridge & Niver, and out of the proceeds of bond sales they paid the amount thereof directly to the plaintiff, charging the same to the Irrigation Company. The earlier estimates appear to have been promptly paid, but as time went on Trowbridge & Niver, who were also promoting other projects, became embarrassed, and finally fell into insolvency. Much of the money coming into their hands from the sale of bonds they properly applied to the discharge of the Irrigation Company's obligations, but, as now appears, a considerable [560] amount was wrongfully appropriated to other purposes. For want of funds to enable it to proceed, and also because of the disapprobation of the State with the manner in which some of the work was being done, the plaintiff ceased work on August 15, 1910. Asserting that there was a balance due to it approximating \$525,000.00, in due time, and in compliance with the statutes of Idaho, it filed in the proper recorder's offices its claim of lien, and com-

menced this suit for the foreclosure of the same, on October 15, 1910, and upon its application a receiver was appointed to take charge of all the property, on the 29th day of May, 1911.

The intervenor, the Union Portland Cement Company, is a Utah corporation, and seeks the foreclosure of a lien for material furnished to the Irrigation Company through the plaintiff for the construction of the system. The plaintiff's contract with the Irrigation Company did not cover the cement required for the concrete work, and at the time it entered into the oral agreement with the promoters of the Irrigation Company there was an understanding that it would, for and upon behalf of the Irrigation Company, purchase the necessary cement. Accordingly it had a verbal agreement with the intervenor pursuant to which the latter commenced to furnish cement for the work, and actually delivered a consignment thereof upon the ground on September 2, 1909, although the agreement with the Irrigation Company, which was identical with the oral understanding, was not signed until some time later. It continued to furnish cement until the 25th of June, 1910. Claiming that there was a balance due to it of \$13,774.56, it in due time filed its claim of lien therefor, and commenced an action for the foreclosure thereof on October 22, 1910. It was originally named as a defendant in this suit, but, having been dismissed therefrom, by leave of Court, it filed its complaint in intervention on January 4, 1912, during the pendency of the receivership. [561]

The other parties defendant claim liens as subcon-

tractors under the plaintiff.

Such, in briefest outline, is a sketch of the origin of the controversy; the other facts can be more profitably adverted to in connection with the discussion of the several questions to which the issues were reduced in the argument upon the final submission.

JURISDICTION.

The first point urged by the mortgagee is that the Court is without jurisdiction because the Union Portland Cement Company and certain subcontractors under the plaintiff, all residents and citizens of the state of Utah, were originally made parties defendant, together with the present defendants, and that therefore there was wanting the requisite diversity of citizenship. Without objection upon the part of anyone, the plaintiff took a voluntary dismissal as to these parties, and, as has already been stated, the Union Portland Cement Company thereafter came in by intervention. The contention is that all of these claimants so dismissed from the suit are not only proper and necessary, but indispensable parties, and that their presence would be fatal to our jurisdiction. But in the first place it is to be observed that they are not present, and in no manner is their absence pleaded as a defense. Defendants should, upon a proper showing of the facts, have demanded that such claimants, if any there be, be made parties, and in response to such demand the Court could have made such order as was appropriate, and if, after any such parties were brought in, it appeared that their presence left the case without the requisite diversity of citizenship, it would then have

been proper to move for a dismissal. *Shields vs. Barrows*, 58 Fed. 129. But nonjoinder is not pleaded, and we cannot properly presume or assume the existence of liens the nature of which is such as to make the holders thereof indispensable parties, or that the presence of such persons would oust the Court of jurisdiction. [562] It is entirely possible that if the subcontractors had been brought in it would appear that their interests are of such character that, for jurisdictional purposes, they should be aligned with the plaintiff against the defendants, rather than with the defendants against the plaintiff. However that may be, as the case now stands, with the parties before it, the Court appears to have jurisdiction, for there are both the requisite diversity of citizenship and the necessary value of the matter in dispute. But if the point were properly presented by the pleadings, the result I am inclined to think would be the same. The controlling question then would be whether or not, in a suit brought by a contractor to foreclose a mechanic's lien, all other lien claimants are indispensable parties. It may readily be conceded that they are necessary parties, and it is much to be regretted that after a receiver was appointed, thus making it possible for all to come in and have their liens adjudicated, the interested parties did not take the proper steps to bring about that result. Clearly, however, the Union Portland Cement Company is not an indispensable party. The source of its claim is entirely distinct from that of the plaintiff; it asserts a lien upon the same property, and that is all. In like manner sev-

eral mortgagees may hold liens upon the same property, but it would not be contended that in a foreclosure suit brought by any one of them it is indispensable that all others be made parties. Neither a prior nor a subsequent mortgagee is an indispensable party; the only indispensable party is the owner of the title of the mortgaged property. Subsequent mortgagees are usually made parties in order that their claims may be foreclosed, but plainly the Court can enter a decree foreclosing the interest of the owner without prejudice to their rights, and "the relation of an indispensable party to the suit must be such that no decree can be entered in the case which will do justice between the parties actually before the Court without injuriously affecting the rights of such absent parties." *Wolterman vs. Canal-Louisiana Bank*, 215 [563] U. S. 33. The mere convenience of the parties who are before the Court is insufficient to render absent parties indispensable. *United States vs. Allen*, 179 Fed. 13. It may well be that the case of a subcontractor presents additional considerations, but it is thought that they all relate not to the question of "indispensableness," but only to the degree of inconvenience.

PLAINTIFF'S CAPACITY TO CONTRACT.

The objection under this head is that plaintiff, being a foreign corporation, and, as is claimed, having failed to comply with the laws of Idaho relating to foreign corporations doing business within the State, prior to the oral agreement entered into about June 15, 1909, was without the capacity to contract, under Section 10 of Article XI of the Constitution of

Idaho, and statutes enacted to give effect thereto. It is not thought necessary to analyze the record for the purpose of determining whether the plaintiff was actually in default, for, assuming the correctness of the defendants' contention in that respect, the fact furnishes no bar to the maintenance of this suit. A contract made by a noncomplying corporation is not void, but such corporation is by the statute denied a remedy in the Idaho courts; the contract may be sued upon and enforced in other courts of competent jurisdiction. It has been so decided in this court (*Colby vs. Cleaver*, 169 Fed. 206), and no substantial reason is advanced for abandoning the position. From certain expressions found in the opinions of the Supreme Court of Idaho in *Katz vs. Herrick*, 12 Idaho, 1, 86 Pac. 873, it is ingeniously argued that the laws of Idaho, as thus authoritatively construed, are identical with the statutes which, in *Diamond Glue Co. vs. United States Glue Co.*, 187 U. S. 611, were held to declare such contracts unenforceable in the federal as well as in the state courts. It is not pretended that in phraseology the two statutes are the same, but only that the Idaho statute, with the supposed construction of the Idaho court, is equivalent to that of Wisconsin. But, of course, the Idaho court, in using the general expressions relied upon, had [564] no reference to the federal courts or the courts of other States. It was considering an actual, not a moot, question. The last expression of its latest decision upon the point makes this view perfectly clear. In *Valley Lumber Co. vs. Driessel*, 13 Idaho, 662, 667, 93 Pac. 765, it is said: "The Court

did not hold in that case (Katz vs. Herrick) that such contracts were void, *but held that such contracts were not enforceable in the courts of this state by the noncomplying corporation*'' (italics ours). This is exactly the holding of Colby vs. Cleaver, and without a strain is the only meaning that can be drawn from the language of the statute, which, as was remarked in that case, gives evidence of having been carefully chosen to express with precision the intention of the legislature to exclude certain features which it was thought might imperil the validity of the entire legislation.

IS A CAREY ACT PROJECT LIENABLE.

The next objection urged by the mortgagee is that irrigation works constructed under the provisions of the Carey Act are not subject to a mechanic's lien. It is conceded that such structures are within the literal terms of the lien laws, but it is argued that because such statutes in their original form were enacted prior to the passage of the Carey Act, it is not to be presumed that the legislature intended to extend the lien to structures of this character. The point has been ruled adversely to the present contention both by the Supreme Court of Idaho and by this court. Nelson-Bennett Co., et al. vs. Twin Falls L. & W. Co., 14 Idaho, 5, 93 Pac. 789; Pacific Coast Pipe Co. vs. Kings Hill Irrigation & Power Company, (opinion filed in this court December 15, 1911). It is urged that the question presents a different aspect here because it is raised by the mortgagee, but when the argument is analyzed it is found that no consideration is advanced which could not with equal

or greater reason be brought forward by the constructing or owning company. [565] If it be conceded that in contracts for the construction of such projects the personal status and responsibility of the construction company are material considerations, and if the state has the right to insist that the particular company with which it contracts shall perform, and if therefore it need not recognize an assignee, the reasoning, when carried to its logical conclusion, is quite as cogent against a mortgage as against a mechanic's lien. It is immaterial that the mortgage may have been approved by some officer of the state, for of what advantage can that fact be to the state in case such mortgage is foreclosed, and what assurance has the state that a purchaser at a sale following a mortgage foreclosure will be any more to its liking than the purchaser at a sale under the foreclosure of a mechanic's lien? Nor does the fact that the constructing or owning company has executed a large number of contracts to divers persons for the sale of water rights in the system, go to the validity of the lien, however much it may impair the value thereof. As to both these contentions it is sufficient to say that neither the state nor the purchasers of water rights are before the Court, and therefore such rights as they may have will not be affected by a foreclosure decree. These are matters of no concern to the defendant. If, as argued, most of the water rights have been sold, and such rights are exempt from the plaintiff's lien, and if therefore a lien upon the canal system is upon an empty shell, of little or no value, and if the state is

not bound to recognize the purchaser at a foreclosure sale as the successor in interest to all of the construction company's rights, then, to be sure, there is need for solicitude on the part of the plaintiff, but not on the part of the mortgagee. The defendants' appeal to considerations of public policy is not highly persuasive. While the irrigation company is a quasi-public corporation, the service it renders is in character essentially the same as that of irrigation companies diverting and distributing water for irrigation purposes under the general laws [566] of the state, and in the one case no more than in the other is the public interest or the public welfare involved. I am therefore unable to see why we should with violence read into the comprehensive language of the statutes an exception in the one case if not in the other. It is of no consequence that "Carey Act Projects" were unknown when the lien statutes were enacted. Neither were railroads and telegraph lines known when the Constitution of the United States was adopted, but such instrumentalities are not therefore exempt from the operation on the interstate commerce clause of the Constitution. As I read Sections 5110 and 5111 of the Idaho Revised Codes, they clearly evince an intention on the part of the legislature to confer the right of lien upon all persons furnishing material or performing labor, except only such as are protected by the faith and credit of the public. By the latter section structures belonging to counties, cities, towns, and school districts, are expressly declared to be lienable for the claims of subcontractors, materialmen and laborers.

Original contractors are excepted, presumably for the reason that they may enforce their contracts against such municipal corporations by ordinary process, and of course they stand in no danger of loss on account of the insolvency of their debtors; they are therefore without need of protection by lien. Such being the declared policy of the State, the supposed reasons for which it was held in certain cases cited by the mortgagee that railroads were not subject to seizure and judicial sale, are inapplicable. It may be added that there is no purpose here, as in some of the railroad cases, to sell a portion only of a system and by dismemberment to destroy or greatly impair its value. The foreclosure of the plaintiff's lien will leave the entire system intact, and it will remain quite as serviceable to the public as it is under the present ownership. [567]

PERFORMANCE OF A CONTRACT.

The most serious consideration is presented by the contention that the plaintiff has not substantially performed its contract with the Irrigation Company, and that for that reason it is entitled to no relief of any kind. The right of the mortgagee to interpose this defense is questioned by the plaintiff, but I am inclined to think that it is quite as available to the mortgagee as to the Irrigation Company. It is to be added, however, that in the absence of fraud or collusion between the plaintiff and the Irrigation Company (of which there are here no proofs) the defendant mortgagee is bound by the construction which they placed upon the doubtful or uncertain provisions of the contract and by any waiver on the

part of the Irrigation Company of the strict performance thereof. Phillips on Mechanics' Liens (3d Ed.), Sec. 254. The evidence offered by the mortgagee tending to show defective work is voluminous and relates to features both of the dam and of the appurtenant canals. But as was frankly stated at the argument by counsel for the mortgagee, the defects, if any, in the distributing system are in any view of the case of a less serious nature than those in the dam; hence the latter alone need be discussed, for it follows as a matter of course that if these more important considerations do not afford a defense, then there is none in this branch of the case. It cannot be doubted that the dam as constructed is substantially wanting in efficiency for the purpose for which it was designed, and the only question is whether the blame therefor rests upon the plaintiff or upon the Irrigation Company and its engineer, Arnold & Company. Preliminarily, referring to an incidental question touching the burden of proof and the probative value of the certificates of the engineer upon which payments were made to the plaintiff from time to time as the work progressed, it is held that the burden was upon the plaintiff to make a *prima facie* showing of the substantial performance of its contract, [568] and further that the engineer's certificates are *prima facie* evidence of the amount of work done by, and of the amount of money due to, the plaintiff. The questions are of little importance at this time, for in any view the plaintiff made a *prima facie* case. It is further clear that if the plaintiff substantially com-

plied with the contract up to the time it wholly abandoned the work it was, by reason of the failure of the Irrigation Company to make payments, justified in declining to proceed further, and is entitled to compensation at the stipulated rate for the work actually performed.

THE DAM.

From the contract it is learned that the dam was designed to intercept and impound the water flowing in the Big Lost River. It is about 2,000 feet in length, terminating at one end in a rocky bluff adjacent to the river bed, and upon the other side of the river resting upon a gradual slope. It was contemplated that the maximum height of the embankment would be ——— feet, and the extreme width at the base ——— feet. It was in the main to be constructed of earth, but was to have a concrete core. It is recited and provided in the specifications that: "The solid rock at one end of the dam stands on a very steep slope, the lower part of which is covered with float rock, which will have to be excavated in order to allow the foundation of the concrete core-wall at the end of the dam to be bedded in solid rock. Along the river bed and on the opposite side of the rock there is a layer of gravel of varying thickness, averaging about fifteen feet. Underneath the gravel is a bed of impervious clay and gravel. From the base of the rock bluff, sheet piling is to be driven in the clay extending across the river and part way up the slope. From the termination of the sheet piling a trench is to be dug through the layer of gravel, and this trench back filled with material, making a bond

with the impervious material underlying the thin gravel layer at the higher elevations. The main fill is to be earth embankment, the upstream face protected by riprap." Even [569] with the comparatively shallow body of water impounded by the partially completed structure there is an excessive and dangerous subterranean discharge arising from percolation through the embankment itself, either due to the want of compactness, or the artificial structure not having been laid deep enough to make a close bond with a stratum of impervious material, the water percolates into the gravelly bed of the reservoir, and then seeps out beneath the base of the core-wall and constructed embankment.

Touching the embankment itself, the mortgagee assails the work of the plaintiff in two principal particulars: It is asserted (1) that the material was not deposited or put in place in the manner called for by the contract, and (2) that it was not properly "puddled." Confining our attention now to the first head, it is found that the earth embankment was formed by the use of steam shovels and cars, the material being procured within the reservoir site just above the dam and deposited in layers or lifts about fifteen feet deep to the full length and width of the embankment as designed. As I construe the specifications, they direct that to commence one of these lifts two trestles for the support of tracks shall be constructed substantially parallel to the core-wall, one along the lower toe and one along the upper toe of the embankment, and that from the cars passing over these trestles material shall be dumped until a

fill is raised to the level of the tracks, and thereupon the tracks shall be gradually shifted as there is need toward the core-wall, the plan being always to dump the material toward the center of the dam both from the lower and the upper trestle. So dumped the material would continuously fall upon a slope determined by the angle of repose, the object being to place all sloping strata toward the center of the embankment. It is further directed that care be taken to protect the concrete core against unequal earth pressure. Unquestionably to some extent the plaintiff deviated from the course thus prescribed, [570] in that, instead of erecting a trestle strong enough to carry its cars to the lower toe of the embankment it constructed a narrow fill diagonally from the upper toe to the lower toe, which it used as a roadbed for the track in the place of a trestle. This fill or roadbed was constructed by commencing it at the upper toe and elongating it diagonally toward the lower toe, as already stated, by dumping material from a car pushed out upon a temporary trestle, which, by shifting, was kept just in advance of the completed portion of the fill. The material used in making these diagonal fills was similar to that entering into all other parts of the dam, and consisted of a mixture in varying proportions of fine earth and sand, and gravel ranging from small pebbles to units several inches in diameter. The theory urged by the mortgagee is that by reason of the manner in which the material was deposited in these diagonal fills there was almost a complete separation of the fines from the coarse, and that the stratum of coarse

gravel and cobble stones thus formed, in effect constitutes a blind drain through which the water freely percolates. It is impracticable to analyze in detail the testimony adduced in support of this theory, and it must suffice to say that from the entire record, and in the light of reason and common observation, I am unable to escape the conviction that certain of the experts who testified upon behalf of the mortgagee sought to attach altogether too much importance to this feature of the work. It may be conceded that if this method had been generally adopted in the construction of the dam its efficiency and strength might have been measurably impaired. But such construction was limited and exceptional, and what was done was with the full knowledge and approbation of the chief representative in the field of Arnold & Company, if not of their managing engineer at Chicago. Moreover, it may be remarked in passing that in the method prescribed by the specifications for depositing the material there is no protection [571] against the separation of the coarse from the fines. Dumped upon the upper surface of a precipitously sloping embankment, the constant tendency would be for the finer particles to lodge near the top, and for the larger units upon becoming detached to roll to the bottom, thus forming a horizontal stratum of coarse material separating the upper and nether lifts. But however that may be, and if it be assumed that the engineer was without the power to authorize the deviation complained of, I am satisfied that this feature contributes little, if anything, to the inefficiency of the structure.

Passing now to the matter of puddling, we find that the specifications contain this provision: "The method of puddling this material shall be as follows: It is the intention to thoroughly wet the interior portion of the dam throughout a section of embankment which extends for a distance of thirty feet each side of the core-wall at the base of the dam, to the maximum height, with a width of six feet of wetted section on the crest of the dam, the limits being defined for various elevations of dam by straight lines drawn between these points. Such labor must be performed and plant furnished to carry out this wetting continuously during the forming of the embankment as is satisfactory to the engineer. The cost of this wetting, plus ten per cent, will be paid as hereinafter specified." It will be observed that the wetting or puddling was to be done by the plaintiff upon a "force account"; that is, it was to be paid the actual cost plus ten per cent. Clearly, it had no incentive to slight or economize upon the work; every incentive was the other way, for the larger the expenditure upon this account the larger its net profit. Moreover, the contract furnishes no clear or definite standard of the measure of the plaintiff's duty. Whether at any time the puddling was reasonably sufficient was a matter of judgment, and the question was one [572] peculiarly for the decision of a representative of the Irrigation Company, for upon it fell the burden of paying the expense. The puddling was to be such as was "satisfactory to the engineer." Arnold & Company's representative was upon the ground all the

time, and expressed no dissatisfaction with what was done; indeed, he in a large measure directed the work. Suppose the plaintiff, conceiving that that which was being done was insufficient, had insisted upon incurring a much larger expense, over the objection of the engineer; would it not have found his disapproval an insurmountable obstacle to the recovery of compensation? At least it is thought to be clear that in a matter of this character it was wholly justified in submitting to the judgment and in following the direction of the engineer in charge.

I am convinced that the vital defect in the dam is the absence of a bond between the superstructure and an impervious stratum underlying the bed of the reservoir, and that therefore it is of slight importance how the material in the earth embankment was deposited, or how much or how little puddling was done. While there may be very little direct evidence to this effect, from the testimony of the mortgagee's engineers touching the practicability of rendering the dam serviceable and from other features of the record, the inference is unavoidable that no alterations of or additions to the structure would avail unless connection were in some way made with an impervious foundation, and the uncertainty whether such a bond is feasible makes it doubtful whether the structure is of any value at all. The mortgagee seeks to attach to the plaintiff the responsibility for the defect, but in this view I am unable to concur. While it is true that by certain general language of the contract it is directed that the artificial structure be connected with an im-

pervious stratum, the drawings attached, by unmistakable marks and notations indicate the depth [573] to which it was contemplated the excavation should be made. In work of such importance it was but reasonable for the plaintiff to assume that before these plans were drafted and before the contract was executed the engineers for the Irrigation Company had, by borings or other means, informed themselves of the nature of the subjacent strata, and had intelligently decided that the site was practicable, and that the depth noted upon the plans was at least probably sufficient. But apart from this consideration Arnold & Company, the engineer, was at all times represented upon the ground, and by one of such representatives the plaintiff was specifically informed as to the depth the concrete core should be sunk, and his successor was present when the excavations were made and the foundation was laid, and either expressly or tacitly gave his approval. Indeed there is no suggestion that the plaintiff deceived the engineers or deviated from their instructions, but when analyzed the argument is that it should, upon its own responsibility, have determined whether the material was suitable for a foundation or not. It is important to note in this connection that under the contract the plaintiff was not being paid a lump sum for the job, but its compensation was to be at a stipulated rate per cubic yard. There is no intimation that at such price the work could not be profitably done, and consequently there could have been no motive of self-interest actuating the plaintiff to curtail the extent of it. It would be

wholly unreasonable and highly unjust to require it, in the face of explicit instructions of the engineer, to exercise its own judgment as to the necessary depth for the core-wall. It would have pursued such a course at the greatest peril, for in seeking recovery for the extra work thus done it could have been assailed with the charge that its motive for violating the instructions of the engineer was to increase the yardage, to its pecuniary advantage, and it might be a matter of the greatest difficulty to show that the engineer's judgment was erroneous. But however that may be, I [574] have no hesitation in holding that the plaintiff was wholly justified in abiding by the decision and following the directions of the engineer in a matter of discretion so peculiarly involving the exercise of judgment and professional skill. The plaintiff was not an expert in the art of dam building, and did not represent itself to be such; it did not assume to underwrite but only to execute the plans adopted by the Irrigation Company. The construction and interpretation of these plans it was obligated to take, and it did take, from the engineer employed and designated by the Irrigation Company to perform that function and to supervise the work.

There is no merit in the contention that the plaintiff was bound to procure, and could be protected only by, a written interpretation and written instructions from the chief or consulting engineer of Arnold & Company in Chicago. The Irrigation Company designated the corporation Arnold & Com-

pany as its engineer, and Arnold & Company maintained upon the project a corps of engineers, the chief of whom is to be regarded as having had charge of the work in the field. He assumed and exercised the right of directing the work, and of giving instructions to the plaintiff, and by the plaintiff he was recognized as having authority so to do. True, it was understood both by himself and the plaintiff that he was subject to the superior authority of the home office and of the chief engineer of Arnold & Company in charge of irrigation projects, but it is clear that by all parties in interest he was regarded as the representative of Arnold & Company in the field, and that his instructions while acting within the scope of his authority to supervise the work under the contract, were binding until they were revoked or modified by his superiors. Arnold & Company's governing board was not in the field; its chief engineer was in Chicago most of the time, and was upon the ground only upon two or three different occasions. The Irrigation Company, through Trowbridge & [575] Niver, its fiscal agents, and through Arnold & Company, its engineer, was urging the plaintiff to rush the dam to completion. How was the plaintiff to procure the judgment of an engineer thousands of miles away in Chicago as to the sufficiency of any given stratum to serve as the foundation for the dam? The puddling which was going on continuously was to be done to the satisfaction of the engineer. If Rosecrans in Chicago is deemed to be the only engineer having power to pass upon the sufficiency of the work how

was the plaintiff to secure an expression of his satisfaction with the puddling and with the other work in the course of construction? Enough has been said to make it clear that for the purpose of interpreting and applying the provisions of the contract to the conditions upon the ground as there was need from day to day as the work progressed, authority was vested in the chief engineer upon the ground; such must have been the understanding of all parties.

My conclusion upon the whole matter is that the responsibility for the inefficiency of the dam does not rest upon the plaintiff, but is apparently chargeable to a want either of skill or of care upon the part of the engineer. I say *apparently* chargeable to the engineer, for in view of the fact that Arnold & Company is not a party to this suit, but has pending in this court an action for the recovery of compensation under its contract with the Irrigation Company, it would not be proper to form an unqualified opinion touching its rights or to indulge in the expression of criticism warranted by the present record, but which might turn out to be harsh or unjust in the light of the explanation or showing it may be able to make when it has its day in court.

For the foregoing reasons the decree will be in favor of the plaintiff and the intervenor. Minor questions relating to the exact amount due to each of these parties, including attorneys' fees, are reserved for further consideration. In the meantime the [576] solicitor for the prevailing parties will draft a form of decree and submit the same to other counsel in the case.

(Although the general conclusion herein expressed has already been announced, in view of the large interests involved, I have thought it to be due to the parties briefly to indicate the reasons for such conclusion; hence this opinion, the preparation of which has been delayed by the press of other duties.)

Dated this 4th day of November, 1912.

[Endorsed]: Filed September 4, 1912. [577]

[**Final Decree.**]

*In the District Court of the United States, in and for
the District of Idaho, in the Ninth Circuit.*

COREY BROS. CONSTRUCTION COMPANY, a
Corporation,

Plaintiff,

vs.

BIG LOST RIVER IRRIGATION COMPANY, a
Corporation, THE CONTINENTAL AND
COMMERCIAL TRUST AND SAVINGS
BANK (Formerly THE AMERICAN
TRUST AND SAVINGS BANK), a Cor-
poration, NEPHI HANSEN and EPH-
RIAM HANSEN, Copartners Under the
Firm Name and Style of HANSEN BROS.,
K. L. MOLEN and R. E. KUTLER, Copart-
ners Under the Firm Name and Style of
MOLEN & KUTLER, J. W. CURD and N.
FOSS, Copartners Under the Firm Name
and Style of CURD & FOSS, K. L. MOLEN
and JESSE MOLEN, Copartners Under the

Firm Name and Style of MOLEN & MOLEN,
DAVID CHAMBERLAIN and THOMAS
CHAMBERLAIN, Copartners Under the
Firm Name and Style of CHAMBERLAIN
BROS., FRANK HESS, S. H. WALTON,
F. L. PINNEY, WILLIAM MOONEY and
FRANK H. JONES,

Defendants,

And

UNION PORTLAND CEMENT COMPANY, a
Corporation,

Intervener.

This cause came on regularly to be heard at this September term of court, 1912, upon the pleadings and evidence and upon all the records on file, and was argued by counsel, and thereupon, on consideration thereof, and the Court being fully advised in the premises, it was ORDERED, ADJUDGED AND DECREED as follows, to wit:

1. That the plaintiff, Corey Bros. Construction Company, do have and recover from the defendant, Big Lost River [578] Irrigation Company, the sum of \$522,884.03, together with interest thereon at the rate of seven per cent per annum from the 15th day of August, 1910, making a total of \$609,444.03; and also \$16,000.00 as attorney's fees. That the intervener, Union Portland Cement Company, do have and recover from the defendant, Big Lost River Irrigation Company, the sum of \$13,774.56, together with interest thereon at the rate of seven per cent per annum from the 15th day of August, 1910, making a total of \$16,054.40; and also \$1,000.00 as attorneys'

fees. And that the plaintiff, Corey Bros. Construction Company, and the intervener, Union Portland Cement Company, do have and recover from the defendant, Big Lost River Irrigation Company, their costs of suit, taxed at \$500.00.

2. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Corey Bros. Construction Company, and the intervener, Union Portland Cement Company, are entitled to and have a first charge and lien for the security and payment of the above sums of money, upon the following described property, to wit:

All of the following lands in Custer County, State of Idaho: The Northeast Quarter of the Southeast Quarter (NE. $\frac{1}{4}$ SE. $\frac{1}{4}$) of Section Three (3), Lot Three (3) of Section Four (4), the Southeast Quarter of the Northeast Quarter (SE. $\frac{1}{4}$ NE. $\frac{1}{4}$) of Section Five (5), the Northwest Quarter of the Northwest Quarter (NW. $\frac{1}{4}$ NW. $\frac{1}{4}$), and the South Half of the Northwest Quarter (S. $\frac{1}{2}$ NW. $\frac{1}{4}$) of Section Eleven (11), Township Seven (7) North, Range Twenty-three (23) East; the Southwest Quarter (SW. $\frac{1}{4}$) of Section Thirty-three (33), Township Eight (8) North, Range Twenty-three (23) East, Boise Meridian, in all 405.25 acres, more or less, which lands upon the construction of the Company's impounding dam will be flooded, and will then become and thereafter be lands under water, forming an integral part of said irrigation system.

All the reservoirs, dams, canals, ditches laterals, head-gates, [579] coulees, draws, flumes, rights of

way and of flowage, easements, permits, privileges and franchises for dams, reservoirs, canals, ditches, and laterals, and, in general, the entire irrigation works, project, and system in Blaine, Bingham, Custer and Fremont Counties, State of Idaho, consisting of about two hundred miles of main and lateral canals and ditches, commonly known as the Big Lost River Irrigation System, together with all franchises and powers, privileges and appurtenances connected therewith.

All the right to divert and use the waters of the Big Lost River and Antelope Creek in the State of Idaho, and all other rights under the following permits:

Permit No. 1507, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1507;

Permit No. 1513, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of one hundred (100) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho in Book 5 of Permits, at page 1513;

Permit No. 1748, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of two hundred (200) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 6 of Permits, at page 1748;

Permit No. 4061, being an amendment to Permit No. 1507, to appropriate the waters of the Big Lost River and its tributaries, as the same is of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4061. [580]

Permit No. 4062, being an amendment of Permit No. 1513, to appropriate the waters of Antelope Creek, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4062.

Permit No. 4063, being an amendment to Permit No. 1748, to appropriate the waters of the Big Lost River and its tributaries, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 11 of Permits, at page 4063.

Permit No. 4946, to appropriate the waters of Big Lost River and its tributaries to an amount equivalent to a continuous flow of one thousand (1,000) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4946.

Permit No. 4960, to appropriate the waters of Antelope Creek to an amount equivalent to a continuous flow of five hundred (500) cubic feet per second, as the same appears of record in the office of the State Engineer of the State of Idaho, in Book 14 of Permits, at page 4960.

Permit No. 4101, to the Mackay Irrigation Company, Limited, for water out of Big Lost River, as the same appears of record in the State Engineer's office of the State of Idaho.

That certain right of way for the Big Lost River

Reservoir situated in Townships 7 and 8 North, Range 23 east, Boise Meridian, Custer County, State of Idaho, approved by the Acting Secretary of the Interior, August 2d, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905, and to the field-notes of the survey thereof, with witness points and witness corners of Townships 7 and 8 North, Range 23 East, Boise Meridian, filed in said office July 13th, 1908; and to the amended map and amended field-notes [581] showing the definite location of said reservoir, filed in the United States Land Office at Hailey, Idaho, on the 18th day of June, 1909.

That certain right of way for the Big Lost River Canals, situated in Townships 3, 4, 5 and 6 North, Ranges 25, 26 and 27 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, approved by the Acting Secretary of the Interior August 2d, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho, on the first day of August, 1905.

That certain right of way for the Lower Big Lost River Reservoir in Sections 21 and 28, Township 3 North, Range 27 East, Boise Meridian, approved by the Secretary of the Interior on April 27, 1906, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Lower Big Lost River Canals, situated in Township 3 North, Range 27 East, Boise Meridian, in Blaine County, State of Idaho, approved by the Commissioner of the General Land Office by letter F, dated April 20th, 1906, for a more particular description of which right of way reference is hereby made to the map and field-notes thereof, filed in the United States Land Office at Hailey, Idaho.

That certain right of way for the Antelope Reservoir situated in Township 4 North, Range 24 East, Boise Meridian, in Blaine and Custer Counties, State of Idaho, application for which was filed in the United States Land Office, Hailey, Idaho, on June 18th, 1909, for a more particular description of which reservoir reference is hereby made to the map and field-notes thereof filed in said land office on said day. [582]

All the rights, grants, interests, privileges, easements and franchises acquired by the Big Lost River Irrigation Company under or in that certain contract dated May 27th, 1909, made by and between the State of Idaho, through its State Board of Land Commissioners, and George S. Speer, and by said George S. Speer transferred and assigned to the Big Lost River Irrigation Company, for the construction of an irrigation system and works for the reclamation under the provisions of the Carey Act of approximately one hundred thousand (100,000) acres of land in the Big Lost River Valley in the Counties of Custer, Blaine, Bingham and Fremont in the State of Idaho; as well as any amendment to the above mentioned

present contract, for the construction of irrigation works and systems in Idaho under the Carey Act, constituting extensions or additions to its said present system.

All right, title, and interest in and to said Idaho State Desert Land List No. 31, made by George S. Speer under the name of G. S. Speer to the State Board of Land Commissioners of Idaho, for the irrigation of the lands mentioned in said list, which said list is on file with the State Board of Land Commissioners of the State of Idaho.

Also all lands mentioned in Segregation List No. 8, which are more fully described in those articles of agreement made on the 27th day of February, A. D. 1907, by and between E. A. Hitchcock, Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and Frank R. Gooding, Governor of the State of Idaho, for and on behalf of the State of Idaho, party of the second part, for a more full description of which lands reference is hereby made to said articles of agreement as they appear on file and of record with the State Board of Land Commissioners of the State of Idaho.
[583]

Also all lands mentioned in Segregation List No. 18, which lands are more fully described in those articles of agreement made and entered into on the second day of July, A. D. 1908, by and between Frank Pierce, Acting Secretary of the Interior, for and on behalf of the United States of America, party of the first part, and Hon. F. R. Gooding, Governor, for and on behalf of the State of Idaho, party of the

second part, and for a more full description of said lands reference is hereby made to said articles of agreement as they appear of record and on file with the State Board of Land Commissioners of the State of Idaho.

3. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the liens of the plaintiff, Corey Bros. Construction Company, and the intervenor, Union Portland Cement Company, are valid and subsisting liens upon all the property hereinbefore described and are prior and superior to the mortgage liens held by the defendants, The Continental and Commercial Trust and Savings Bank, formerly the American Trust and Savings Bank, and Frank H. Jones, one of which Trust Deeds bears date of July first, 1909, and was recorded in the office of the County Recorder of Bingham and Blaine Counties on the third day of September, 1909, and recorded in the office of the County Recorder of Fremont County, on the fourth day of September, 1909, and in the office of the County Recorder of Custer County on the eighth day of September, 1909, which mortgage or trust deed was given to secure two million dollars' worth of bonds; and also that certain trust deed which bears date of January first, 1910, given to secure \$400,000.00 worth of bonds, and which was thereafter filed in the County Recorder's office of the Counties of Blaine, Bingham, Fremont, and Custer, of the State of Idaho, and in which the defendants, Continental and Commercial Trust and Savings Bank, formerly the American Trust and Savings Bank, and Frank H. Jones, are named as

trustees. That the said mechanics' liens of the plaintiff, Corey [584] Bros. Construction Company, and the intervener, Union Portland Cement Company, are superior to and prior to any of the claims or liens of the other defendants hereinbefore named.

4. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the defendant, Big Lost River Irrigation Company, shall, within five days after the entry of this decree, pay or cause to be paid to the Clerk of this Court, for the use and benefit of the plaintiff, Corey Bros. Construction Company, and the intervener, Union Portland Cement Company, the sums of money hereinbefore mentioned, together with interest thereon, from the date of the entry of this decree to the time of payment of said money. That unless said payment as hereinbefore provided shall be made by the defendant, Big Lost River Irrigation Company, or by any other defendants in this cause, or by anyone in their behalf, within the time and in the manner directed aforesaid, that all the property hereinbefore described be sold as hereinafter directed, to satisfy said claims of the plaintiff, Corey Bros. Construction Company, and said intervener, Union Portland Cement Company, and that under and by said sale all equity of redemption of the defendants, and of any and all persons claiming by, through, or under said defendants, or either of them, or represented by any of the parties hereto, of, in, and to said property, lands, rights, and franchises, be foreclosed and cut off and forever barred, and that said property

be sold as an entirety and in one parcel, without valuation, appraisement or redemption, at public auction, to the highest bidder or bidders, at the courthouse in Hailey, County of Blaine, State of Idaho, on a day or days to be fixed by the Special Master of this Court, and public notice of such sale and the time and place thereof, together with the manner and the terms upon which said sale is to be conducted, shall be given by said Special Master in the manner following, to wit: By advertisement, which shall describe briefly the property to be sold, [585] the terms of this decree, the time and place at which the sale is to be made, and the terms and conditions upon which it is to be conducted, which advertisement shall be published once a week in two newspapers published in the Counties of Blaine and Bingham, in the State of Idaho, for a term of four weeks preceding the day of sale, the first publication of which shall be at least thirty days before the day of sale. The said Special Master shall have the power and right to adjourn and postpone said sale from time to time, and may without further notice proceed with the said sale, on any date to which the same may have been adjourned, and may, at his option, give such further notice of sale in addition to the notice above described as he may think proper or as the plaintiff and intervenor may request. That any party to this action may become a bidder or purchaser at said sale. That said sale shall be for cash, ten per cent to be payable at the time of said sale and the balance to be paid at the time of the confirmation by this Court of said sale. That if the plaintiff, Corey

Bros. Construction Company, and the intervener, Union Portland Cement Company, or either of them, shall bid in said property, then and in that case said bidder or bidders shall be entitled to have their judgments, or so much thereof as may be necessary, credited upon such bid instead of paying cash. But in the event said property shall be bid in by the plaintiff, Corey Bros. Construction Company, or by the intervener, Union Portland Cement Company, or said parties shall both bid in said property, then in that case said bidder or bidders shall pay to the Special Master making said sale sufficient moneys to pay, satisfy and discharge any unpaid compensation which has been or shall be allowed by the Court to the Receiver herein, and all unpaid indebtedness, obligations and liabilities, if any there be, which have been legally contracted or incurred by said Receiver at any time before the confirmation of said sale; and shall also pay [586] in sufficient money to pay the cost of making said sale and all the expenses of the Special Master incurred herein, and also sufficient moneys to pay the fees allowed to plaintiff's and intervener's counsel.

5. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the funds arising from the sale of said premises shall be applied as follows: To the payment of the proper costs of this suit; Receiver's compensation, including attorneys' fees for said Receiver, and all obligations of said Receiver legally incurred; and the expenses of the sale herein; and the payment of the taxes due on said property; and also the attorneys' fees allowed for the foreclos-

ing of said mechanic's lien; and the balance realized on the said sale shall be applied to the payment of the principal and interest so found due to the plaintiff, Corey Bros. Construction Company, and the intervener, Union Portland Cement Company, and if, after making the foregoing payments, there shall be any surplus remaining, then the same shall be held and applied as the Court shall thereafter order and direct.

6. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That upon the payment of the purchase price by the purchaser or purchasers of said property, that said Special Master shall execute and deliver a deed, conveying the property purchased, to said purchaser, or purchasers, or his or their successors or assigns, and upon the execution and delivery of such deed the grantee thereunder shall be let into the possession of the premises conveyed. This possession shall, nevertheless, be subject to the condition that this Court may retake and recall the property conveyed, in case the purchaser or purchasers, his or their successors or assigns, shall fail to pay any balance on the purchase price remaining unpaid, or to settle the claims of the Receiver, or to comply with any other [587] provision contained in this decree. That the purchaser or purchasers, and his or their successors or assigns, shall, after such delivery of the premises, hold and enjoy and possess said premises and property and all the rights, privileges and immunities and franchises thereto appertaining, free and clear of any lien or liens of the trust deeds or mortgages held by the

Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees, which trust deeds bear date of July first, 1909, for \$2,000,000.00, and January first, 1910, for \$400,000.00, and that said purchaser or purchasers shall thereupon be entitled to have and to hold the said premises so conveyed, free and discharged from all the liens of all the parties to this suit, and those claiming under them.

7. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That the defendant, Big Lost River Irrigation Company, at the time of the execution of the said deed by said Special Master, as a further assurance to the purchaser or purchasers, execute its deed or join with said Special Master in the execution of the deed to be made by him, and shall thereby convey and release to the purchaser or purchasers, and his or their successors or assigns, all its right, title and interest in and to the property conveyed by said Special Master to the said purchaser or purchasers.

8. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That in case the proceeds of said sale shall prove to be insufficient to provide for the payment in full of the sums hereinbefore mentioned and described, then said Special Master shall find and report to this Court the amount of such deficiency or deficiencies and the person or persons to whom such deficiency or deficiencies are payable, and such report being confirmed by this Court, such person or persons as may be found thereby to be entitled to the terms of the said deficiency or deficiencies,

shall have judgment therefor [588] against the defendant, Big Lost River Irrigation Company, for such amount so found to be payable, and shall be entitled to execution therefor, pursuant to the rules and practice of this Court.

9. IT IS FURTHER ORDERED, ADJUDGED AND DECREED, That JAMES E. CLINTON, Receiver in this Action, be, and he is hereby appointed Special Master, to execute this decree and make the said sale, and execute and deliver the deeds of conveyance of the property sold, to the purchaser or purchasers thereof. As soon as any sale shall have been made by the said Special Master in pursuance of this decree, he shall report the same to this Court for confirmation, and shall from time to time thereafter make such further supplemental reports as shall be necessary to keep the Court and the parties to this suit properly advised of his proceedings in the execution of this decree.

Dated this 27th day of December, A. D. 1912.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed December 27, 1912. [589]

[Title of Court and Cause.]

Petition for Appeal.

COME NOW the defendants, Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees, and conceiving themselves aggrieved by the decree made and entered on the 27th day of

December, A. D. 1912, in the above-entitled cause, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and said defendants pray that this appeal may be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. [590]

MAYER, MEYER, AUSTRIAN & PLATT,

Chicago, Illinois,

AMOS C. MILLER,

Chicago, Illinois,

RICHARDS & HAGA,

Boise, Idaho,

Solicitors for Defendants, Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees.

AMOS C. MILLER,

O. O. HAGA,

Of Counsel for said Defendants.

Order Allowing Appeal.

And now, to wit, on the 26th day of March, 1913, IT IS ORDERED that the petition be granted and the appeal allowed, as prayed for.

FRANK S. DIETRICH,

District Judge.

[Endorsed]: Filed March 26, 1913. [591]

[Title of Court and Cause.]

Assignment of Errors.

And now come the defendants, The Continental and Commercial Trust and Savings Bank, and Frank H. Jones, as Trustees, and having prayed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree entered in the above cause on the 27th day of December, A. D. 1912, say, that the said decree made and entered as afore-said is erroneous and unjust to these defendants, and particularly in this:

1. Because the District Court erred in adjudging and decreeing that the plaintiff, Corey Bros. Construction Company, recover of the defendant Big Lost River Irrigation Company the sum of \$522,-884.03 with interest, making a total of \$609,444.03, and the sum of \$16,000.00 as attorneys' fees, and in [592] adjudging that the plaintiff was entitled to recover either of said sums, or any part thereof.

2. Because the said Court erred in adjudging that the Union Portland Cement Company recover of the defendant, Big Lost River Irrigation Company, \$13,774.56, together with interest, making a total of \$16,054.40, and \$1,000.00 attorneys' fees, and in adjudging that the plaintiff was entitled to recover either of said sums, or any part thereof.

3. Because said Court erred in adjudging that the plaintiff, Corey Bros. Construction Company, and the intervener, Union Portland Cement Company, recover of the defendant the costs of the suit, taxed at \$500.00.

4. Because the said Court erred in adjudging and decreeing that the said Corey Bros. Construction Company are entitled to and have a first lien for the security and payment of said sums upon the property described in the final decree herein.

5. Because the said Court erred in adjudging and decreeing that the said Corey Bros. Construction Company and Union Portland Cement Company are entitled to a lien upon the contract dated May 27th, 1909, between the State of Idaho and George S. Spear, and by Spear transferred to the Big Lost River Irrigation Company, for the construction of an irrigation system and works, and the reclamation under the Carey Act of approximately 100,000 acres of land in the Big Lost River Valley, and the amendments to said contracts; and in adjudging that said contract be sold for the payment of the claims of said Corey Bros. Construction Company and Union Portland Cement Company.

6. Because the said Court erred in adjudging and decreeing that said Corey Bros. Construction Company and Union Portland [593] Cement Company are entitled to a lien for the payment of the sums due them upon the Idaho State Desert Land List No. 31, made by George S. Spear, under the name of G. S. Spear; and in adjudging that said list be sold for the payment of the claims of said Corey Bros. Construction Company and Union Portland Cement Company.

7. Because said Court erred in adjudging and decreeing that said Corey Bros. Construction Company and Union Portland Cement Company are en-

titled to a lien for the payment of said claims on all lands in Segregation List No. 8, described in the agreement of the 27th day of February, 1907, between E. A. Hitchcock, Secretary of the Interior, on behalf of the United States and Frank R. Gooding, on behalf of the State of Idaho; and in adjudging that said lands be sold for the payment of the claims of Corey Bros. Construction Company and Union Portland Cement Company.

8. Because said Court erred in adjudging and decreeing that the said Corey Bros. Construction Company and Union Portland Cement Company are entitled to a lien for the payment of their said claims on all lands mentioned in Segregation List No. 18, more fully described in the agreement dated July 2, 1908, between Frank Pierce, Acting Secretary of the Interior, on behalf of the United States, and the Hon. F. R. Gooding, Governor of Idaho, on behalf of the State of Idaho, and in decreeing that said lands must be sold for the payment of such claims.

9. Because said Court erred in adjudging and decreeing that Corey Bros. Construction Company and Union Portland Cement Company have liens on the property described in said decree superior to the mortgage liens held by the Continental and Commercial [594] Trust and Savings Bank and Frank H. Jones, under two trust deeds, one of which is dated July 1st, 1909, recorded in the office of the County Recorder of Bingham and Blaine Counties, September 4th, 1909, and of Custer County, September 8th, 1909, which trust deed was given to secure

Two Million Dollars (\$2,000,000.00) of bonds; and the other of which trust deed bears date of January 1st, 1910, given to secure Four Hundred Thousand Dollars (\$400,000.00) of bonds, and thereafter filed in the County Recorder's office in the Counties of Bingham, Blaine, Fremont and Custer, the same parties being trustees.

10. Because the said Court erred in adjudging and decreeing that unless payment be made of the claims of the said Corey Bros. Construction Company and Union Portland Cement Company within five days, the property described in said decree be sold, and that by said sale the equity of redemption of defendants and all persons claiming by, through or under them, in and to said property, lands, rights and franchises be cut off and barred.

11. Because the Court erred in not fixing and determining the amount of the unpaid indebtedness, obligations and liabilities legally contracted or incurred by the Receiver, and in not decreeing that such ascertained amounts be paid by Corey Bros. Construction Company or Union Portland Cement Company, or the one of them who shall bid at the sale provided for in said decree, in the event that either of the said parties shall bid at the said sale.

12. Because the said Court erred in adjudging and ordering that upon the payment of the purchase price by the purchaser or purchasers at such sale, said Special Master shall execute and deliver a deed conveying the property described in the decree and sold at the said sale to the purchaser or purchasers.

13. Because the said Court erred in adjudging that such purchaser or purchasers might be let into possession of the property as described in the decree and sold at said sale before the entire purchase price was paid or the claims of the Receiver settled.

14. Because the said Court erred in adjudging and decreeing that the purchaser at such sale shall hold and possess the property rights, privileges and franchises described in the decree and to be sold at the sale free and clear of the lien of the aforesaid trust deeds.

15. Because the said Court erred in adjudging and decreeing the Big Lost River Irrigation Company should execute its deed, or join with the Special Master in the execution of a deed to be made by him, conveying or leasing to the purchaser or purchasers at the said sale, all its right, title and interest in and to the property to be sold at said sale.

16. Because the said Court erred in appointing James E. Clinton, Receiver of the Big Lost River Irrigation Company, Special Master to execute said decree and make said sale.

17. Because the said Court erred in not specifically exempting from the property upon which said Corey Bros. Construction Company and said Union Portland Cement Company are entitled to a lien for the payment of their said claims, and which property is decreed to be sold to satisfy said claims, all contracts by settlers upon the lands irrigated and to be irrigated by said Big Lost River Irrigation Company's works, and said Big Lost River Irrigation Company; and in not exempting from the said prop-

erty to be sold all sums still due upon said contracts.

18. Because the said Court erred in finding that Corey Bros. Construction Company had complied or specifically complied [596] with its contract with the Big Lost River Irrigation Company for the construction of the dam and irrigation works and canals.

19. Because the said Court erred in not finding that the said Corey Bros. Construction Company failed to comply with the said contract with the Big Lost River Irrigation Company in failing to dump all materials toward the core-wall or center of the dam from a trestle in either toe thereof and parallel thereto; in failing to properly wet or puddle the materials of which said dam was composed; in failing to sink or extend the core-wall of said dam to impervious material; in failing to extend the back-filled trench down to impervious material, or to material that would sufficiently hold water; in dumping excavated rock within the lines of the dam and so near the core-wall thereof as to interfere with proper puddling and settling of the material; in excavating borrow-pits too near the dam; in failing to drive sheet piling to impervious material below the dam; and that by reason of such failures on the part of Corey Bros. Construction Company the said dam failed to hold water, and failed to fulfill the purpose for which it was made, and resulted in the State of Idaho stopping the work upon such dam, and thereby rendering useless and unavailable all the work done upon such irrigation system.

20. Because the said Court erred in not finding that said Corey Bros. Construction Company com-

mitted such material departures from its contract with the Big Lost River Irrigation Company for the construction of the dam and controlling works and system of canals and laterals that the said dam and irrigation system were rendered useless for the purpose for which they were designed, and resulted in the work thereon being stopped by the State of Idaho and the system being left in an unfinished [597] condition so that it is useless as an irrigation system.

21. Because the said Court erred in not finding that said Corey Bros. Construction Company failed to employ, in constructing the dam and reservoir and irrigation system, workmanship which was first class, or competent supervision, but that on the contrary it furnished inferior workmanship, and the work was so poorly supervised that the said dam and reservoir and irrigation system failed to fulfill the purpose for which it was designed.

22. Because the said Court erred in not finding and decreeing that said Corey Bros. Construction Company entered into the contract in question with the Big Lost River Irrigation Company for the construction of the Big Lost River reservoir, dam and irrigation system at a time when the said Corey Bros. Construction Company had not complied with the laws of the State of Idaho relating to foreign corporations, or secured a license to do business within the State of Idaho; and that said Corey Bros. Construction Company, pursuant to the contract, entered upon the execution of said contract within the State of Idaho before it, the said Corey Bros. Construction Company, had complied with said laws of the State

of Idaho relating to foreign corporations, or secured such license, and that thereby the said Corey Bros. Construction Company is barred from maintaining a suit upon said contract.

23. Because the said Court erred in not holding that the contract bearing date August 26th, 1910, between Corey Bros. Construction Company and the Big Lost River Irrigation Company for the construction of the Big Lost River reservoir, dam and irrigation system was by reason of the fact that the said Corey Bros. Construction Company had not, when it entered into and [598] began the execution of said contract, complied with the laws of Idaho relating to foreign corporations, or secured a license to do business in the State of Idaho.

24. Because the said Court erred in not holding that it was without jurisdiction in this cause, because the record shows that there are indispensable parties whose interests are adverse to those of the complainant and whose residence and citizenship are the same as that of the plaintiff, but which parties have not been made defendants.

25. Because the said Court erred in holding that the irrigation works constructed under the provisions of the Carey Act are subject to mechanics' liens and may be sold to satisfy the claim of a contractor who has furnished labor and material in the construction of the same.

26. Because the said Court erred in finding that the deviations from the contract of the Big Lost River Irrigation Company by the Corey Bros. Construction Company was acquiesced in or waived by

the said Irrigation Company.

27. Because the said Court erred in holding that the failure of the dam constructed by said Corey Bros. Construction Company for the Big Lost River Irrigation Company on its said contract, was due solely to the absence of a bond between the superstructure and an impervious stratum underneath.

28. Because the said Court erred in finding that the failure of said Corey Bros. Construction Company to construct a sufficient bond between the superstructure of the dam in question and the impervious stratum underneath was waived or acquiesced in by said Big Lost River Irrigation Company.

29. Because the said Court erred in holding that the Corey Bros. Construction Company was not, and did not represent itself [599] to be, an expert in dam building.

30. Because said Court erred in holding that the resident engineers employed by the Arnold Company and stationed upon the work being conducted by the Corey Bros. Construction Company in the construction of the irrigation works of the Big Lost River Irrigation Company, had authority to authorize deviations from its said contracts by said Corey Bros. Construction Company, and that such deviations might be lawfully authorized by Arnold & Company, or their agents, otherwise than in writing.

31. Because the said Court erred in holding that the inefficiency of the dam in question was not due to the manner in which Corey Bros. Construction Company executed its contract and performed such construction work, but to the lack of skill or care of the

engineer, Arnold & Company.

WHEREFORE, these defendants pray that said decree be reversed and set aside and the District Court directed to dismiss complainant's bill and the bill in intervention filed by the Union Portland Cement Company.

MAYER, MEYER, AUSTRIAN & PLATT,

Chicago, Illinois,

AMOS C. MILLER,

Chicago, Illinois,

RICHARDS & HAGA,

Boise, Idaho,

Solicitors for Defendants, Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees.

AMOS C. MILLER,

O. O. HAGA,

Of Counsel for said Defendants. [600]

Service of the foregoing Assignment of Errors, and receipt of copy thereof, admitted this 26th day of March, 1913.

H. H. HENDERSON,

Solicitors for Complainant, and Union Portland Cement Company, Intervener.

[Endorsed]: Filed March 26, 1913. [601]

[Title of Court and Cause.]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, the Continental and Commercial Trust and Savings Bank, a corporation, and Frank H. Jones,

all of Chicago, State of Illinois, as Trustees, and as principals in this obligation, and the Boise Title and Trust Company, a corporation, with its principal place of business at Boise, Idaho, as surety, are held and firmly bound unto the above named Corey Bros. Construction Company, complainant, and to the Union Portland Cement Company, intervener, in the above-entitled suit, in the sum of Five Hundred Dollars (\$500.00) to be paid to the said Corey Bros. Construction Company and the said Union Portland Cement Company as their respective interests may appear, and for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our successors and assigns, [602] jointly and severally firmly by these presents.

Sealed with our seals and dated this 26th day of March, 1913.

The conditions of this obligation are such that:

WHEREAS, the above named, The Continental and Commercial Trust and Savings Bank and Frank H. Jones, as Trustees, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the decree made and entered in the above-entitled suit in the Circuit Court of the United States for the District of Idaho, Southern Division, on the 27th day of December, 1912.

NOW, THEREFORE, if the above-named appellants, the Continental and Commercial Trust and Savings Bank and Frank H. Jones, as Trustees, shall prosecute their said appeal to effect and answer all costs if they fail to make their said plea good, then the above obligation shall be void; otherwise, the same

shall be and remain in full force and virtue.

IN WITNESS WHEREOF, the said principals have caused their respective names to be hereunto subscribed, and the said Boise Title and Trust Company, surety, has caused its name to be hereunto subscribed by its duly authorized officers and its corporate seal affixed.

THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK,
Trustee.

By O. O. HAGA,
Its Solicitor.

FRANK H. JONES,
Trustee.

By O. O. HAGA,
His Solicitor.

[Seal] BOISE TITLE AND TRUST COMPANY,

By S. H. HAYS,
President.

Attest: RAYMOND S. HOOVER,
Secretary.

Approved, March 26, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed Mar. 26, 1913. [603]

[Title of Court and Cause.]

Stipulation Relative to Record on Appeal.

It is hereby stipulated and agreed, by and between
The Continental and Commercial Trust and Savings

Bank and Frank H. Jones, appellants, and Corey Bros. Construction Company and the Union Portland Cement Company, appellees, through their respective solicitors, that in order to save expense in the printing and certification of the record, and to avoid encumbering the record with papers and documents not pertinent to the questions raised on appeal, the following portions of the record, and no more, shall be transcribed, certified and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit by the Clerk of the United States District Court for the District of Idaho, under the appeal taken by the said appellants herein, and shall be included in the printed record on said appeal, [604]

1. The original Bill of Complaint filed by Corey Bros. Construction Company.

2. Answer of Big Lost River Irrigation Company to complainant's Bill of Complaint.

3. Answer of The Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees, and all amendments thereto, to complainant's Bill of Complaint.

4. Bill in Intervention of Union Portland Cement Company.

5. Answer of Big Lost River Irrigation Company to said Bill in Intervention.

6. Answer of said Trustees to said Bill in Intervention.

7. Order Appointing Receiver of Big Lost River Irrigation Company.

8. Record or statement of evidence settled and

allowed by the judge of said District Court, and all exhibits thereto attached.

9. Opinion of Court filed in said cause.

10. Decree.

11. All papers filed for perfecting the appeal (assignment of errors, petition for appeal, order allowing appeal, bond, citation, and all orders made in connection therewith).

12. This stipulation.

13. It is stipulated and agreed that on the 27th day of November, 1910, Corey Bros. Construction Company, complainant in said suit, filed an amended Bill of Complaint, being similar in all respects to the original complaint, except that the following parties were made defendants in said Bill: Big Lost River Irrigation Company, a corporation; The Continental and Commercial Trust and Savings Bank, a corporation; Union Portland Cement Company, a corporation; J. M. Bate and Joseph Bate, copartners [605] under the firm name and style of Bate & Bate; Nephi Straw, A. W. Cherrington and James Miller, copartners under the firm name and style of Straw, Cherrington and Miller; F. C. Gammell and James Straw, Jr., copartners under the firm name and style of Gammell & Straw; Nephi Hansen and Ephriam Hansen, copartners under the firm name and style of Hansen Bros.; K. L. Molen and R. E. Kutler, copartners under the firm name and style of Molen & Kutler; J. W. Curd and N. Foss, copartners under the firm name and style of Curd & Foss; K. L. Molen and Jesse Molen, copartners under the firm name and style of Molen & Molen; David Chamber-

lain and Thomas Chamberlain, copartners under the firm name and style of Chamberlain Bros.; A. C. Bird, Frank Hess, S. H. Walton, F. L. Pinney, Wm. Mooney, Goyne Drummond and Frank H. Jones. And said complainant alleged in the usual form that said defendants were citizens as follows, viz.: Big Lost River Irrigation Company, citizen of Idaho; The Continental and Commercial Trust and Savings Bank, citizen of Illinois; Union Portland Cement Company, citizen of Utah; J. M. Bate and Joseph Bate, citizens of Utah; Nephi Straw, A. W. Cherrington and James Miller, citizens of Utah; F. C. Gammell and James Straw, Jr., citizens of Utah; Nephi Hansen and Ephriam Hansen, citizens of Idaho; K. L. Molen and R. E. Kutler, citizens of Idaho; J. W. Curd and N. Foss, citizens of Idaho; K. L. Molen and Jesse Molen, citizens of Idaho; David Chamberlain and Thomas Chamberlain, citizens of Idaho; A. C. Bird, citizen of Utah; Frank Hess, S. H. Walton, F. L. Pinney and Wm. Mooney, citizens of Idaho; Goyne Drummond, citizen of Wyoming, and Frank H. Jones, citizen of Illinois.

It is further stipulated, that replications were duly filed to the answers referred to in this stipulation, and that [606] thereafter, on the 21st day of January, 1911, on motion of the solicitor for Corey Bros. Construction Company, an order was entered dismissing said amended bill as to the defendants, Union Portland Cement Company, J. M. Bate and Joseph Bate, Nephi Straw, A. W. Cherrington, James Miller, F. C. Gammell, James Straw, Jr., A. C. Bird and Goyne Drummond.

It is further stipulated and agreed that all original exhibits introduced in the above-entitled cause, including the depositions of the witnesses and the testimony and affidavits introduced as evidence by consent of the parties, shall be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit before the hearing of the cause in said Court, and the same may be used upon the argument or the hearing of said cause in said court, and shall be considered as part of the record on appeal therein as fully and to the same extent as if transcribed and printed in the record. And appellants shall have the right, and they may be so required to do by appellees if deemed necessary, to print as part of the record on appeal any exhibit and any other part of the record not hereby expressly authorized to be transcribed and printed.

Dated this 26th day of March, 1913.

H. H. HENDERSON,

Solicitor for Complainant and for Intervener, Union
Portland Cement Company.

MAYER, MEYER, AUSTRIAN & PLATT,
AMOS C. MILLER,

RICHARDS & HAGA,

Solicitors for the Continental and Commercial Trust
and Savings Bank and Frank H. Jones, Trustees.

[Endorsed]: Filed March 23, 1913. [607]

Citation.

THE UNITED STATES OF AMERICA,—ss.
To Corey Bros. Construction Company and Union
Portland Cement Company, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco in the State of California, within thirty (30) days from the date of this Writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein Corey Bros. Construction Company is plaintiff and the Big Lost River Irrigation Company, the Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees, et al., are defendants, and the Union Portland Cement Company is intervener, to show cause, if any there be, why the judgment, order or decree in said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 26th day of March, one thousand nine hundred and thirteen, and of the Independence of the United States, the one hundred and thirty-seventh year.

FRANK S. DIETRICH,
United States District Judge for the District of
Idaho.

Attest: A. L. RICHARDSON,
Clerk.

Service of the foregoing Citation and receipt of copy thereof admitted this 26th day of March, 1913.

H. H. HENDERSON,

Solicitor for Corey Bros. Construction Company and
Union Portland Cement Company. [608]

[Endorsed]: Filed March 26, 1913. [609]

[Title of Court and Cause.]

Order Relative to Exhibits on Appeal.

On motion of Messrs. Richards & Haga, of counsel for the Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees, it is ordered that in addition to the transcript of the record on appeal in this suit, the Clerk of this Court transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, all the original exhibits in this suit, to be by him safely kept and returned to this Court upon the final determination of the appeal in this suit in said Circuit Court of Appeals.

Dated this 29th day of March, 1913.

(Signed) FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed March 29, 1913. [610]

Return to Record.

And thereupon it is ordered by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit

Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal]

Attest: A. L. RICHARDSON,

Clerk. [611]

**[Clerk's Certificate of District Court to Transcript
of Record.]**

[Title of Court and Cause.]

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 612, inclusive, to be full, true and correct copies of the original Bill of Complaint, Answer of Big Lost River Irrigation Company to complainant's Bill of Complaint, Answer of The Continental and Commercial Trust and Savings Bank and Frank H. Jones, Trustees, and all amendments thereto, to complainant's Bill of Complaint, Bill in Intervention of Union Portland Cement Company, Answer of Big Lost River Irrigation Company to said Bill in Intervention, Answer of said Trustees to said Bill in Intervention, Order Appointing Receiver of Big Lost River Irrigation Company, Record of statement of evidence settled and allowed by the Judge of said District Court, and all exhibits thereto attached, Opinion of [612] Court filed in said cause, Decree, Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Bond, Stipulation relative to Record on Appeal, Original Citation, Return to Record and Clerk's Certificate, in the above-entitled cause, and that the same together constitute the transcript of

the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the record herein amounts to the sum of \$250.00, and that the same has been paid by the appellant.

Witness my hand, and the seal of said Court, affixed at Boise, Idaho, this 29th day of March, 1913.

[Seal]

A. L. RICHARDSON,

Clerk. [613]

[Endorsed]: No. 2264. United States Circuit Court of Appeals for the Ninth Circuit. Continental and Commercial Trust and Savings Bank, a Corporation, and Frank H. Jones, Trustees, Appellants, vs. Corey Bros. Construction Company, a Corporation, and Union Portland Cement Company, a Corporation, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Idaho, Southern Division.

Filed April 4, 1913.

FRANK D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.



